Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]

Compiled by Professor G. Feltoe

Updated Jan 2012
Preface

A “Code” is a piece of legislation gathering together in one place all the main aspects of a particular branch of the law.

This Code brings together in one piece of legislation all of the major aspects of the Criminal Law of Zimbabwe, whilst at the same time effecting a whole series of reforms and improvements to the pre-existing Criminal Law. Hence the title of the Act refers to both codification and reform of the Criminal Law.

The adoption of the Criminal Law Code by Parliament is an important development for the Criminal Law of Zimbabwe. This Code will both improve the quality of the Zimbabwean Criminal Law and its general accessibility.

Previously the Criminal Law of Zimbabwe was widely dispersed. Much of the Criminal Law was not written down in statutes but was contained in the common law. The locating of the common law dealing with a particular crime or a defence to criminal liability was often a laborious exercise as it involved tracing back to the original common law and then ascertaining how over the years the Zimbabwean courts (and also the South African courts) had interpreted and applied that common law. A considerable amount of the previous Criminal Law was widely dispersed and was contained in a whole variety of different pieces of legislation.

As the Code not only brings together in one place the pre-existing law but also makes a series of changes to the pre-existing law, it will be necessary for all those involved in the administration of the Criminal Law to familiarise themselves with what is contained in this Criminal Law Code.

This Commentary is intended to provide a basic guide to the Code to enable those using it to find their way around it and to understand the changes to the law that it brings about. It will be of use to legal practitioners, judicial officers, prosecutors, defence lawyers and police officers. The Commentary will also be of assistance to Law Students studying the subject of Criminal Law.

Where the Criminal Law Code has simply codified the existing law without alteration, reference can still continue to be made to A Guide to the Criminal Law in Zimbabwe by G. Feltoe (3rd ed published by the Legal Resources Foundation of Zimbabwe in 2004.) Throughout this commentary, references will be provided to the relevant portions of this Guide. (This guide will be referred to in this commentary simply as “Guide”.)

The following statutes are referred to in this commentary—
  Aircraft Offences Act [Chapter 9:01]
  Anatomical Donations and Post-mortem Examinations Act [Chapter 15:01]
  Child Abduction Act [Chapter 5:05]
  Children’s Act [Chapter 5:06]
  Civil Aviation Act [Chapter 13:16]
  Criminal Procedure and Evidence Act [Chapter 9:07]
Customary Marriages Act [Chapter 5:07]
Dangerous Drugs Act [Chapter 15:03]
Fiscal Appeal Court Act [Chapter 23:05]
Income Tax Act [Chapter 23:06]
Inquests Act [Chapter 7:07]
Intellectual Property Tribunal Act [Chapter 26:08]
Labour Act [Chapter 28:01]
Magistrates Court Act [Chapter 7:10]
Marriage Act [Chapter 5:11]
Medicines and Allied Substances Control Act [Chapter 15:03]
Mental Health Act [Chapter 15:12]
Miscellaneous Offences Act [Chapter 9:17]
Police Act [Chapter 11:10]
Prisons Act [Chapter 7:11]
Preservation of Constitutional Government Act [Chapter 11:01]
Public Health Act [Chapter 15:09]
Public Order and Security Act [Chapter 11:17]
Reserve Bank Act [Chapter 22:15]
Road Traffic Act [Chapter 13:11]
Serious Offences (Confiscation of Profits) Act [Chapter 9:17]
Witchcraft Suppression Act [Chapter 9:19]

When these statutes are referred to in the commentary, the chapter numbers will be omitted.

I would like to thank Mr N Dias and Mr Crozier for their meticulous editorial checking of this text.
CONTENTS

MAJOR CHANGES IN CRIMINAL LAW CODE .......................................................... 1
  Crimes .............................................................................................................. 1
  Defences ........................................................................................................ 6
FRAMING OF CHARGES UNDER CODE ................................................................ 7
PRELIMINARY MATTERS .................................................................................. 8
  Interpretation of terms .................................................................................. 8
  Replacement of Roman-Dutch law ............................................................... 8
  Interpretation of Code provisions ................................................................. 8
  Criminal provisions contained in other legislation .................................... 10
  Jurisdiction for crimes committed inside and outside Zimbabwe (Territoriality) ... 10
ELEMENTS OF CRIMINAL LIABILITY ................................................................. 13
  Criminal Capacity ........................................................................................ 13
  Children below 7 ......................................................................................... 13
  Children of 7 or over but below 14 .............................................................. 13
  Capacity in respect of sexual offences ......................................................... 14
  Persons over 14 ........................................................................................... 16
  Criminal Conduct ......................................................................................... 17
  Liability for criminal conduct .................................................................... 17
  Acts or omissions ......................................................................................... 17
  Liability for omission .................................................................................. 17
  Causation ...................................................................................................... 20
  States of Mind .............................................................................................. 24
  Crimes contained in Code .......................................................... 24
  Intention ................................................................................................. 24
  Negligence ............................................................................................... 26
  Statutory crimes not contained in Code .................................................... 26
  Proof of Criminal Liability ........................................................................ 30
  Burden and standard of proof .................................................................... 30
  Fines .......................................................................................................... 31
CRIMES ........................................................................................................ 32
  Crimes Against the State ........................................................................... 32
  Treason ...................................................................................................... 34
  Concealing treason .................................................................................... 36
  Subverting constitutional government ......................................................... 37
  Insurgency, banditry, sabotage or terrorism ................................................ 38
  Recruiting or training insurgents, bandits, saboteurs or terrorists ................ 39
  Training as insurgent, bandit, saboteur or terrorist .................................... 40
  Supplying weapons to insurgents, bandits, saboteurs or terrorists ................. 40
  Possessing weaponry for insurgency, banditry, sabotage or terrorism ............ 41
  Possessing dangerous weapon ................................................................... 42
  Harbouring or concealing insurgent, bandit, saboteur or terrorist .................. 43
  Failing to report insurgent, bandit, saboteur or terrorist ................................. 43
  Causing disaffection among Police Force or Defence Forces ......................... 44
  Publishing or communicating false statements prejudicial to State .......... 45
Unlawful possession or wearing of camouflage uniforms.......................... 46
Undermining the authority of or insulting President .................................. 47
Leave of Attorney-General ........................................................................ 48
Crimes Against Public Order ....................................................................... 49
  Participating in gathering with intent to promote public violence, breach of the peace or bigotry .......................................................... 52
  Obstructing or endangering free movement of persons or traffic .................. 53
  Dealing in or possessing prohibited knives ................................................. 54
  Possession of articles for criminal use ....................................................... 55
  Disorderly conduct in public place .............................................................. 56
  Causing offence to persons of particular race, tribe, place of origin, colour, creed or religion ................................................................. 57
  Possessing an offensive weapon at a public gathering ................................. 58
  Disrupting public gathering ...................................................................... 58
  Intimidation .............................................................................................. 59
  Criminal nuisance .................................................................................... 59
Crimes Against the Person .......................................................................... 60
  Homicide .................................................................................................. 60
  Murder .................................................................................................... 60
  Infanticide ................................................................................................ 62
  Culpable homicide .................................................................................. 65
  Inciting or assisting suicide ..................................................................... 73
  When life starts and ends ......................................................................... 73
  Causing death by accelerating death .......................................................... 74
  Guidelines for causation where death results ............................................. 74
  Mercy killing ............................................................................................ 75
  Removal of person from life support system .............................................. 76
  Causing death by disposal of body ............................................................ 76
  Mistaking identity of murder victim ........................................................ 77
  Causing death of person by blow intended for another (Deflected blow or blow that goes astray) ................................................................. 78
  Joining in attack after fatal blow inflicted ................................................ 78
Unlawful Termination of Pregnancy .......................................................... 79
Sexual Crimes and Crimes Against Morality .............................................. 81
  Defence of marriage ................................................................................ 82
  Boys under 12 ......................................................................................... 82
  Presumptions relating to capacity to consent to sexual acts ....................... 82
  Rape ....................................................................................................... 83
  Aggravated indecent assault ................................................................... 87
  Presumptions relating to capacity to consent to sexual acts ....................... 88
  Indecent assault ...................................................................................... 89
  Unavailable defences to rape, aggravated indecent assault and indecent assault ................................................................. 91
  Guide to correct charges in cases involving young persons ...................... 92
  Where consent absent or vitiated .............................................................. 93
  Unlawful sexual intercourse or indecent acts with young person.............. 94
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual crimes committed against young or mentally incompetent persons outside Zimbabwe</td>
<td>96</td>
</tr>
<tr>
<td>Conspiracy or incitement outside Zimbabwe to commit in Zimbabwe sexual crimes against young or mentally incompetent persons</td>
<td>97</td>
</tr>
<tr>
<td>Sodomy</td>
<td>98</td>
</tr>
<tr>
<td>Bestiality</td>
<td>100</td>
</tr>
<tr>
<td>Sexual intercourse within a prohibited degree of relationship (formerly called Incest)</td>
<td>100</td>
</tr>
<tr>
<td>Complicity in sexual crimes</td>
<td>104</td>
</tr>
<tr>
<td>Public indecency</td>
<td>105</td>
</tr>
<tr>
<td>Deliberate transmission of STD other than HIV</td>
<td>106</td>
</tr>
<tr>
<td>Deliberate transmission of HIV</td>
<td>106</td>
</tr>
<tr>
<td>Mandatory prison sentence where person committing sexual crime infected with HIV</td>
<td>109</td>
</tr>
<tr>
<td>Soliciting for purposes of prostitution</td>
<td>111</td>
</tr>
<tr>
<td>Living off or facilitating prostitution</td>
<td>112</td>
</tr>
<tr>
<td>Procuring</td>
<td>113</td>
</tr>
<tr>
<td>Using threats or drugs to induce sexual conduct</td>
<td>113</td>
</tr>
<tr>
<td>Detaining person for purpose of engaging in unlawful sexual conduct</td>
<td>114</td>
</tr>
<tr>
<td>Permitting young person resort to place for purpose of engaging in unlawful sexual conduct</td>
<td>115</td>
</tr>
<tr>
<td>Allowing child to become prostitute</td>
<td>115</td>
</tr>
<tr>
<td>Crimes Involving Bodily Injury</td>
<td>117</td>
</tr>
<tr>
<td>Assault</td>
<td>117</td>
</tr>
<tr>
<td>Negligent assault</td>
<td>119</td>
</tr>
<tr>
<td>Assault of person other than the intended victim</td>
<td>120</td>
</tr>
<tr>
<td>Kidnapping or unlawful detention</td>
<td>122</td>
</tr>
<tr>
<td>Kidnapping of adult</td>
<td>122</td>
</tr>
<tr>
<td>Kidnapping of child (person under age of 18)</td>
<td>123</td>
</tr>
<tr>
<td>Pledging a female person</td>
<td>125</td>
</tr>
<tr>
<td>Criminal insult</td>
<td>125</td>
</tr>
<tr>
<td>Criminal defamation</td>
<td>128</td>
</tr>
<tr>
<td>Witchcraft, Witch-finding and Related Crimes</td>
<td>130</td>
</tr>
<tr>
<td>Engaging in practices commonly associated with witchcraft</td>
<td>130</td>
</tr>
<tr>
<td>Indicating witches and wizards</td>
<td>131</td>
</tr>
<tr>
<td>Employing non-natural means to resolve crime or delict</td>
<td>132</td>
</tr>
<tr>
<td>Belief in witchcraft not defence to murder or assault</td>
<td>132</td>
</tr>
<tr>
<td>Alternate or concurrent charges</td>
<td>132</td>
</tr>
<tr>
<td>Bigamy</td>
<td>133</td>
</tr>
<tr>
<td>Concealment of Births and Exposure of Infants</td>
<td>135</td>
</tr>
<tr>
<td>Concealment of birth</td>
<td>135</td>
</tr>
<tr>
<td>Exposing an infant</td>
<td>136</td>
</tr>
<tr>
<td>Crimes in Relation to Graves and Corpses</td>
<td>138</td>
</tr>
<tr>
<td>Violation of graves</td>
<td>138</td>
</tr>
<tr>
<td>Violation of corpses</td>
<td>138</td>
</tr>
<tr>
<td>Property Crimes</td>
<td>140</td>
</tr>
</tbody>
</table>
Theft and Related Crimes ................................................................. 140
Theft .............................................................................................. 140
Theft of trust property ................................................................... 142
Making off without payment ......................................................... 146
Special defences to theft, stock theft or unauthorised borrowing .... 147
Unavailable defences to theft, stock theft and unauthorised borrowing 150
Jointly owned property - when spouse, partner or co-owner guilty ...... 151
Theft and stock theft continuing crimes ........................................... 151
Temporary acquisition as security or pledge ..................................... 152
Recent possession of stolen property .............................................. 152
Receiving of stolen property .......................................................... 153
Possessing property reasonably suspected to have been stolen ....... 154
Robbery ......................................................................................... 155
Crimes Involving Entering or Being In or On Premises or Land ........ 158
Unlawful entry into premises .......................................................... 158
Criminal trespass ........................................................................... 160
Extortion ......................................................................................... 161
Fraud and Forgery .......................................................................... 163
Fraud .............................................................................................. 165
Forgery ........................................................................................... 165
Conviction for fraud or other crime involving misrepresentation where specific victim not identified............................................. 167
Causing Damage To or Destruction of Property ............................. 168
Malicious damage to property ......................................................... 168
Negligently causing serious damage to property ......................... 170
Claim of right .................................................................................. 171
Hijacking and Other Crimes Involving Aircraft ............................... 173
Hijacking ......................................................................................... 173
Destroying or prejudicing the safe operation of an aircraft .......... 173
Assaulting, intimidating or threatening a person on an aircraft ...... 174
Placing or carrying dangerous goods on an aircraft .................... 174
Threatening harm in relation to an aircraft .................................... 175
Falsely threatening harm in relation to an aircraft ....................... 175
Proof of lawful reason ..................................................................... 176
Alternative to or concurrent charges to aircraft offences ............. 176
Crimes Involving Dangerous Drugs ................................................. 177
Definitions ..................................................................................... 177
Unlawful dealing in dangerous drugs .............................................. 179
Unlawful possession or use of dangerous drugs .............................. 180
Extra-territorial effect .................................................................... 181
Permitting premises to be used for unlawful dealing in or use of dangerous drugs .......................................................... 181
Concealing, disguising or enjoying proceeds of unlawful dealing in dangerous drugs ......................................................... 182
Lawful possession .......................................................................... 182
Computer-Related Crimes .............................................................. 185
Unauthorised access to computers .................................................. 186
Deliberate introduction of computer virus into computer or computer network .................................................. 187
Unauthorised manipulation of proposed computer programme ................................................................. 187
Unauthorised use or possession of credit or debit cards ........................................................................... 188
Unauthorised use of password or pin-number ............................................................................................... 189

Bribery and Corruption ................................................................................................................................. 190
Bribery ......................................................................................................................................................... 191
Corruptly using false document .................................................................................................................... 193
Corruptly concealing transaction from principal .......................................................................................... 194
Corruptly concealing personal interest in transaction from principal .......................................................... 196
Criminal abuse of duty by a public officer ....................................................................................................... 198

Crimes Against Law Enforcement and Public Administration ........................................................................ 199
Assaulting peace officer ................................................................................................................................. 199
Undermining police authority ....................................................................................................................... 199
Obstructing public official, impersonating police officer, peace officer or public official and deliberately supplying false information to public authority ................................................................. 200
Obstruction of public official ......................................................................................................................... 201
Impersonating police officer, peace officer or public official ....................................................................... 201
Deliberately supplying false information to public authority ......................................................................... 202

Crimes Against the Administration of Justice ................................................................................................. 204
Contempt of court ........................................................................................................................................ 205
Perjury ......................................................................................................................................................... 207
Defeating or obstructing the course of justice ............................................................................................... 209
Escaping from lawful custody ....................................................................................................................... 212

Unfinalised Crimes; ........................................................................................................................................ 215
Threats, Incitement, Conspiracy and Attempt ............................................................................................... 215
Threatening commit a serious crime ............................................................................................................. 215
Incitement .................................................................................................................................................... 216
Conspiracy ................................................................................................................................................... 218
Attempt ........................................................................................................................................................ 220
Acts of mere preparation ............................................................................................................................... 221

Acts that have reached stage of commencement of execution of crime ......................................................... 222
Clear cut cases where in last stages of committing crime .............................................................................. 222
Less clear cut cases ....................................................................................................................................... 222

Participation or Assistance in Commission of Crimes .................................................................................... 224
Actual perpetrator ........................................................................................................................................... 224
Co-perpetrators ............................................................................................................................................ 225
Accomplices ................................................................................................................................................ 227
Conducting to commission of offence by child or young person ................................................................. 231
Assistance after commission of crime ........................................................................................................... 232

GENERAL DEFENCES AND MITIGATING FACTORS ................................................................................. 234
Preliminary matters ....................................................................................................................................... 234
Defences relating to voluntary conduct ........................................................................................................ 234
Automatism .................................................................................................................................................. 234
Defences and Mitigatory Factors Relating to Mental State ........................................................................... 236
Intoxication ................................................................................................................................................... 236
Insanity .......................................................................................................................................................... 240
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defence of non-pathological criminal incapacity</td>
<td>244</td>
</tr>
<tr>
<td>Diminished responsibility</td>
<td>246</td>
</tr>
<tr>
<td>Minority</td>
<td>248</td>
</tr>
<tr>
<td>Ignorance or mistake of fact</td>
<td>249</td>
</tr>
<tr>
<td>Ignorance or mistake of law</td>
<td>250</td>
</tr>
<tr>
<td>Provocation</td>
<td>251</td>
</tr>
<tr>
<td>Defences and Mitigatory Factors Relating to Unlawfulness</td>
<td>254</td>
</tr>
<tr>
<td>Lawful authority</td>
<td>254</td>
</tr>
<tr>
<td>Lawful justification</td>
<td>257</td>
</tr>
<tr>
<td>Compulsion</td>
<td>257</td>
</tr>
<tr>
<td>Consent</td>
<td>259</td>
</tr>
<tr>
<td>Self-defence or defence of another</td>
<td>263</td>
</tr>
<tr>
<td>Defence of property</td>
<td>265</td>
</tr>
<tr>
<td>Entrapment</td>
<td>267</td>
</tr>
<tr>
<td>Impossibility</td>
<td>268</td>
</tr>
<tr>
<td>Necessity</td>
<td>268</td>
</tr>
<tr>
<td>Obedience to orders</td>
<td>270</td>
</tr>
<tr>
<td>Trivialities</td>
<td>271</td>
</tr>
<tr>
<td>Unavoidable accident</td>
<td>272</td>
</tr>
<tr>
<td>COMPETENT VERDICTS</td>
<td>274</td>
</tr>
<tr>
<td>GENERAL</td>
<td>275</td>
</tr>
<tr>
<td>Criminal liability of corporations and associations</td>
<td>275</td>
</tr>
<tr>
<td>Conviction or acquittal no bar to civil or disciplinary proceedings</td>
<td>276</td>
</tr>
<tr>
<td>Concurrent and alternative charges</td>
<td>277</td>
</tr>
<tr>
<td>Standard scale of fines</td>
<td>277</td>
</tr>
<tr>
<td>Reference in enactments to common law crimes</td>
<td>277</td>
</tr>
<tr>
<td>Amendment of Acts</td>
<td>277</td>
</tr>
<tr>
<td>Repeal</td>
<td>277</td>
</tr>
<tr>
<td>Savings</td>
<td>277</td>
</tr>
<tr>
<td>First Schedule</td>
<td>278</td>
</tr>
<tr>
<td>Second Schedule</td>
<td>278</td>
</tr>
<tr>
<td>Third Schedule</td>
<td>278</td>
</tr>
<tr>
<td>Fourth Schedule</td>
<td>278</td>
</tr>
<tr>
<td>Fifth Schedule</td>
<td>279</td>
</tr>
<tr>
<td>Sixth Schedule</td>
<td>283</td>
</tr>
<tr>
<td>Seventh Schedule</td>
<td>284</td>
</tr>
<tr>
<td>Sentencing Jurisdiction of Magistrates</td>
<td>284</td>
</tr>
<tr>
<td>Ordinary Magistrates</td>
<td>284</td>
</tr>
<tr>
<td>Ordinary Jurisdiction (sec 50(1) of the Magistrates Court Act)</td>
<td>284</td>
</tr>
<tr>
<td>Special Jurisdiction (sec 51(1) &amp; (4) of the Magistrates Court Act)</td>
<td>284</td>
</tr>
<tr>
<td>Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)</td>
<td>285</td>
</tr>
<tr>
<td>Senior Magistrates</td>
<td>285</td>
</tr>
<tr>
<td>Ordinary Jurisdiction (sec 50(2) of the Magistrates Court Act)</td>
<td>285</td>
</tr>
<tr>
<td>Special Jurisdiction (sec 51(1) &amp; (4) of the Magistrates Court Act)</td>
<td>285</td>
</tr>
<tr>
<td>Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)</td>
<td>285</td>
</tr>
<tr>
<td>Category</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Specimen Indictments</td>
<td>288</td>
</tr>
<tr>
<td>Provincial Magistrates</td>
<td>286</td>
</tr>
<tr>
<td>Ordinary Jurisdiction (sec 50(3) of the Magistrates Court Act)</td>
<td>286</td>
</tr>
<tr>
<td>Special Jurisdiction (sec 51(1) &amp; (4) of the Magistrates Court Act)</td>
<td>286</td>
</tr>
<tr>
<td>Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)</td>
<td>286</td>
</tr>
<tr>
<td>Regional Magistrates</td>
<td>286</td>
</tr>
<tr>
<td>Ordinary Jurisdiction (sec 50(4) &amp; (6) of the Magistrates Court Act)</td>
<td>286</td>
</tr>
<tr>
<td>Special Jurisdiction (sec 51(2) &amp; (4) of the Magistrates Court Act)</td>
<td>286</td>
</tr>
<tr>
<td>Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)</td>
<td>288</td>
</tr>
<tr>
<td>Crimes against the State</td>
<td>288</td>
</tr>
<tr>
<td>Treason</td>
<td>288</td>
</tr>
<tr>
<td>Concealing treason</td>
<td>289</td>
</tr>
<tr>
<td>Insurgency, banditry, sabotage or terrorism</td>
<td>289</td>
</tr>
<tr>
<td>Publishing or communicating false statement prejudicial to the State</td>
<td>289</td>
</tr>
<tr>
<td>Crimes against Public Order</td>
<td>290</td>
</tr>
<tr>
<td>Public violence</td>
<td>290</td>
</tr>
<tr>
<td>Crimes against the Person</td>
<td>290</td>
</tr>
<tr>
<td>Homicide</td>
<td>290</td>
</tr>
<tr>
<td>Murder</td>
<td>290</td>
</tr>
<tr>
<td>Culpable homicide</td>
<td>290</td>
</tr>
<tr>
<td>Sexual Crimes</td>
<td>290</td>
</tr>
<tr>
<td>Rape</td>
<td>290</td>
</tr>
<tr>
<td>Attempted rape</td>
<td>291</td>
</tr>
<tr>
<td>Rape of a mentally incompetent female</td>
<td>291</td>
</tr>
<tr>
<td>Aggravated indecent assault</td>
<td>291</td>
</tr>
<tr>
<td>Indecent assault</td>
<td>291</td>
</tr>
<tr>
<td>Sexual intercourse with a young person</td>
<td>291</td>
</tr>
<tr>
<td>Commission of sexual crime outside Zimbabwe</td>
<td>292</td>
</tr>
<tr>
<td>Inciting person to commit sexual crime inside Zimbabwe</td>
<td>292</td>
</tr>
<tr>
<td>Sexual intercourse within the prohibited degrees of relationship</td>
<td>292</td>
</tr>
<tr>
<td>Crimes Involving Bodily Injury</td>
<td>292</td>
</tr>
<tr>
<td>Assault</td>
<td>293</td>
</tr>
<tr>
<td>Negligently causing serious bodily harm</td>
<td>293</td>
</tr>
<tr>
<td>Crimes Involving Infringement of Liberty, Dignity, Privacy or Reputation</td>
<td>293</td>
</tr>
<tr>
<td>Kidnapping (of an adult)</td>
<td>293</td>
</tr>
<tr>
<td>Kidnapping (of a child)</td>
<td>293</td>
</tr>
<tr>
<td>Kidnapping (of a child by a non-custodian parent)</td>
<td>294</td>
</tr>
<tr>
<td>Pledging a female person (promising a minor in marriage)</td>
<td>294</td>
</tr>
<tr>
<td>Pledging a female person (promising an adult in marriage)</td>
<td>294</td>
</tr>
<tr>
<td>Criminal insult</td>
<td>294</td>
</tr>
<tr>
<td>Criminal defamation</td>
<td>294</td>
</tr>
<tr>
<td>Witchcraft, witch-finding, etc.</td>
<td>295</td>
</tr>
<tr>
<td>Indicating a witch/wizard</td>
<td>295</td>
</tr>
<tr>
<td>Bigamy</td>
<td>295</td>
</tr>
<tr>
<td>Property Crimes</td>
<td>295</td>
</tr>
<tr>
<td>Theft and related crimes</td>
<td>295</td>
</tr>
</tbody>
</table>
Theft .......................................................... 295
Theft of trust property ........................................ 295
Unauthorised borrowing or use of property ............ 296
Making off without payment ................................ 296
Robbery ............................................................ 296
Unlawful entry onto premises ................................ 296
Criminal trespass .................................................. 297
Fraud ............................................................... 297
Forgery ............................................................. 297
Fraud ............................................................... 297
Extortion ........................................................... 298
Cau\ning damage to or destruction of property ....... 298
Negligently causing serious damage to property ..... 298
Hijacking and Other Crimes Involving Aircraft ....... 298
Hijacking ............................................................ 298
Placing or carrying dangerous goods on an aircraft . 298
Placing or carrying dangerous goods on an aircraft (attempt) 299
Falsely threatening harm in relation to an aircraft ... 299
Crimes Involving Dangerous Drugs ..................... 299
Unlawful dealing in dangerous drugs .................... 299
Unlawful possession of dangerous drugs ............... 299
Computer-Related Crimes .................................... 299
Unauthorised access to or use of computer or computer network .......... 299
Unauthorised use or possession of credit or debit cards .......... 300
Unauthorised use of password or pin-number .......... 300
Bribery and Corruption ....................................... 300
Bribery (accepting bribe) ..................................... 300
Bribery (offering bribe) ....................................... 300
Corruptly concealing personal interest in a transaction .. 301
Threat ................................................................... 301
Incitement .......................................................... 301
Conspiracy .......................................................... 301
Attempt to commit crime contained in Code .......... 301
Attempt to commit crime in statute other than in Code .......... 302
MAJOR CHANGES IN CRIMINAL LAW CODE

The Code has created a number of new crimes and has modified many of the existing crimes. It has also made some changes to the defences to criminal liability.

This summary draws attention only to the important changes brought about by the Code. It does not attempt to deal with every single change or modification. The reasons for these changes are dealt with later in the Commentary when these matters are commented upon in detail.

Crimes

Culpable homicide [s 49]
This crime has been extended to cover situations where there was “conscious negligence”. A person is guilty of this crime not only where he or she fails to realise that death will result from his or her conduct but also where he or she realises that death may result from his or her own conduct and negligently fails to guard against this possibility.

Inciting or assisting suicide [s 50]
A new crime has been created which consists of inciting another to commit suicide or assisting a person to commit suicide.

Taking person off life support system [s 54(2)]
There are new provisions allowing the High Court, on application from a person such as a spouse or close relative, to order the removal of a person from a heart-lung or ventilator machine or other life support system in certain circumstances. The High Court can so order on the basis of evidence by a medical practitioner other than the patient’s doctor that—

- the patient is unconscious and there is no reasonable prospect of that person regaining consciousness; and
- although the patient’s brain functions may not have entirely ceased, that person’s life is being artificially sustained by the life support system and there is no reasonable prospect that the patient will ever be able to survive without being on the life support system.

Rape [s 65]
This crime continues to be a crime that is committed by a male who has non-consensual sexual intercourse with a female. However, the crime has been extended to cover a situation where a male has non-consensual anal intercourse with the female.

Previously a boy under 14 could not commit rape. Now a boy over 12 but under 14 is rebuttably presumed to be incapable of committing rape – he can be convicted of rape if the presumption of incapacity is rebutted.
Previously a girl of or below the age of 12 is irrebuttably presumed to be incapable of consenting to sexual intercourse and thus sexual intercourse with such a girl will constitute rape.

The Code has a new provision relating to girls above the age of 12 but of or below the age of 14. The presumption as to capacity to consent to sexual intercourse by girls in this age category is rebuttable: a male will be guilty of rape if he has sexual intercourse with a girl above the age of 12 but of or below the age of 14 unless he establishes on a balance of probabilities that the girl was capable of giving consent to sexual intercourse and did give her consent. [s 64(2)]

**Aggravated indecent assault [s 66]**

This new sexual crime covers cases where a male or female commits an indecent assault involving non-consensual penetration with indecent intent of any part of the body of the victim or perpetrator. It is more serious than the crime of indecent assault, which does not involve any such penetration. A person found guilty of aggravated indecent assault is liable to the same punishment as for rape (imprisonment for life or any shorter period).

A girl or boy below 12 can’t commit aggravated indecent assault but a girl or boy between 12 and 14 can be convicted of aggravated indecent assault if the State can rebut the presumption that he or she was incapable of committing this crime.

A girl under 12 is irrebuttably presumed to be incapable of consenting to sexual intercourse but a girl above the age of 12 but of or below the age of 14 is rebuttably presumed to be incapable of consenting to sexual conduct that would constitute aggravated assault and X will be guilty of aggravated assault upon a girl between these ages unless he establishes on a balance of probabilities that the girl was capable of giving consent to the sexual activity in question and did give her consent to it. [s 64(2)]

**Sodomy [s 73]**

This crime used to cover only anal sexual intercourse between males. The Code has expanded the scope of this crime. It now includes not only acts of anal sexual intercourse, but also any act involving physical contact between males that would be regarded by a reasonable person as an indecent act e.g. masturbation of a male by another male.

**Sexual intercourse within a prohibited degree of relationship (Incest) [s 75]**

This crime codifies the common law of incest (with modifications) but also now accommodates customary law notions of incest. For example, under customary law sexual relations between cousins is normally prohibited and the persons involved now commit this crime if they are living in accordance with customary law and the customary law of their community prohibits sexual intercourse between such persons.

**Assault [s 89]**

The distinction between “common assault” and “assault with intent to inflict grievous bodily harm” has been abolished. All assaults, except aggravated indecent assault and indecent assault, now fall under the single crime of assault. The seriousness of the assault will now be a matter for sentence.
Administration of a noxious substance is now no longer be a separate offence but will simply be treated as a species of assault.

**Negligent assault** [s 90]

The new crime of “negligently causing serious bodily harm” has been created to cover situations where the accused did not intend to inflict serious bodily harm, but was negligent in causing such harm. The crime is only committed if the bodily harm that is caused is serious.

**Pledging a female person** [s 94]

This crime now also prohibits the customary (or allegedly customary) practice of handing over of a female person to settle a debt or delict.

**Witchcraft and witch-finding** [ss 97-102]

Significant changes have been made to the law relating to law on witchcraft that has been incorporated into the Code. The Code provisions make a distinction between the practices of “witchcraft” and “witch-finding”.

It is no longer an offence to accuse a person of engaging in witchcraft if the accusation is based on good grounds and provided that non-natural means are used to find a witch.

The distinction recognises that witch-finding is not be stigmatised as “witchcraft”, while acknowledging that the practice of witch-finding may in some cases be socially disruptive or cause injustice to the person accused of witchcraft.

**Theft by false pretences**

This separate crime has been abolished and in future cases of what used to be theft by false pretences will be treated as cases of fraud.

**Unauthorised borrowing** [s 116]

This new crime of “unauthorised borrowing or use of property” makes it a crime to borrow or use without authorisation any property belonging to another. Previously it was only a crime to borrow a car or a boat.

**Continuing nature of theft and stock theft** [s 121]

Previously the law on theft provided that a person continued to commit the crime of theft for as long as the stolen property remains in the possession of the thief. The Code drastically changes this rule to provide that theft or stock theft continues to be committed regardless of whether he or she has lost possession of the stolen property. A thief may be tried in which ever magisterial district he or she last possessed the property.

**Making off without payment** [s 117]

This creates the new crime of “making off without payment. This crime will cover situations where “services” rather than “goods” are “stolen”. Also within the scope of this crime is the consumption of goods for which payment after consumption is required but has not been made: in these circumstances the intention to “deprive another person permanently” of ownership, possession or control is incapable of proof, because it may only have been formed after the goods
were consumed and therefore no longer capable of being owned, possessed or controlled by anybody.

**Uttering** [s 137(2)]

Although the common law crime of forgery is retained, the Code abolishes the existing crime of “uttering” (that is, passing off as genuine) a forged document and provides that in the future uttering will be treated as fraud.

If the person who passes off the forged document also forged it, he or she will be liable for both forgery and fraud.

**Computer-related crimes** [s 162-168]

These sections create a series of new crimes to deal with the deliberate misuse of computers, such as deliberate introduction of a virus into a computer. Other crimes in this category include misuse of credit and debit cards, passwords and pin-numbers. Such misuse creates the potential for fraud, sabotage and other harm to the public interest. Such crimes are often collectively described as “cyber-crime”.

**Bribery** [s 170]

Bribery used to be confined to situations where a state official was involved. The Code provisions extend bribery to cover giving and taking of bribes both in the public sector and in the private business sector.

**Corruptly concealing from principal a personal interest in transaction** [s 173]

This creates the new crime of corruptly concealing from a principal a personal interest in a transaction.

**Obstructing a public official** [s 178]

This is a new crime.

**Impersonating a police officer, peace officer or public official** [s 179]

This is a new crime.

**Deliberately supplying false information to a public authority** [s 180]

This is a new crime.

**Threatening to commit specified crimes** [s 184]

This creates the new crime of making a threat to commit a serious crime (such as murder, rape, kidnapping or other crime specified in the section). A person commits this crime where he or she threatens to commit the crime intending to commit that crime, or intending to inspire or realising that there was a real risk of inspiring in the person threatened a reasonable fear or belief that the accused would commit the crime concerned.

**Malicious damage to property** [s 140]

This merges together the common law crimes of arson and malicious injury to property.
This crime is aggravated if the damage was caused by the use of fire or explosives, or involved injury or the risk of injury to persons. [s 143].

**Claim of right defence to malicious damage to property** [s 144]

For the defence of claim of right to succeed, the mistaken belief has to be a reasonable belief.

**Negligently causing serious damage to property** [s 141]

This creates the new crime of destroying or seriously damaging another’s property through gross negligence.

**Subornation of perjury no longer chargeable**

Under the common law there was a separate offence known as subornation of perjury. This common law crime of subornation of perjury has been abolished. Instead, if X incites Y to commit perjury, X will be charged with incitement to perjury or, if the incitement succeeds, and Y gives actually false testimony, X will be charged as an accomplice to the perjury committed by X.

**Unlawful entry into premises** [s 131]

This crime of what was formerly known as housebreaking has been completely reformulated to eliminate the unnecessarily technical requirements of housebreaking. The reformulated crime will simply treat as aggravating factors for sentence such factors as the purpose in entering; the fact that there was forcible entry and the fact that the property entered was a dwelling house.

**Commenting upon pending case now defeating or obstructing the course of justice and not contempt** [s 184(1)]

Previously X would have been guilty of contempt of court where he or she commented upon a case which is pending before a court intending the statement to prejudice the trial of the case.

This will now be treated as a sub-species of the crime of defeating or obstructing the course of justice.

**Attempt to commit a crime** [s 189]

Under this provision the accused is guilty of an attempt to commit a crime if he or she does or omits to do anything intending to commit the crime (or realising that there is a real risk that the crime may be committed), provided that what the accused has done or omitted to do can be said to have reached at least the commencement of the execution of the crime. It is debatable whether this test expands the scope of the crime of attempting to commit a crime.

**Participation or assistance in the commission of crimes** [ss 195-204]

Every joint or associate perpetrator (“co-perpetrator”) is liable as if he or she was the actual perpetrator.

A co-perpetrator is a person other than the actual perpetrator who was present with the actual perpetrator during the commission of the crime; and who knowingly associated with the actual perpetrator (and any other co-perpetrators) with the intention that each or any of them will commit or be prepared to commit the crime actually committed.
Persons who render assistance but who are not present at the scene of crimes are accomplices. Persons who render assistance after crimes have been committed are accessories.

**Defences**

**Voluntary intoxication**

Previously voluntary intoxication could at most be a partial defence. If, because of voluntary intoxication, the accused did not form the intention to commit serious crime he or she would be found guilty of a lesser crime. This “partial defence” had the effect of reducing murder to culpable homicide, assault with intent to commit grievous bodily harm to common assault, rape, to indecent assault (where because of intoxication, the accused mistakenly believed that the woman had consented to sexual intercourse, the accused would be found guilty of indecent assault.)

Now, however, if a person accused of any crime requiring proof of intention, knowledge or realisation of a real risk or possibility (“the crime originally charged”) can show that he or she was intoxicated to such an extent that he or she never formed the requisite state of mind, the court may convict the accused of the new strict-liability crime of “voluntary intoxication leading to unlawful conduct” instead of the crime originally charged, and sentence the accused to the same punishment to which the accused would have been liable if he or she had been found guilty of the crime originally charged and intoxication had been assessed as a mitigatory circumstance in his or her case [s 222].

The following table gives guidance on the correct charge to be brought under the Code–

<table>
<thead>
<tr>
<th>Situation</th>
<th>Charge prior to Code</th>
<th>Charge under Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sets fire to building</td>
<td>Arson</td>
<td>Malicious damage to property</td>
</tr>
<tr>
<td>A man has anal sexual intercourse with a woman without her consent</td>
<td>Indecent assault</td>
<td>Rape</td>
</tr>
<tr>
<td>Passing off a forged document</td>
<td>Uttering</td>
<td>Fraud</td>
</tr>
<tr>
<td>Intentionally inflicting serious bodily injury</td>
<td>Assault with intent to do grievous bodily harm</td>
<td>Assault</td>
</tr>
<tr>
<td>Uses misrepresentation to induce person to hand over property capable of being stolen</td>
<td>Theft by false pretences</td>
<td>Fraud</td>
</tr>
<tr>
<td>Comments upon pending court proceedings intending to prejudice those proceedings</td>
<td>Contempt of court</td>
<td>Defeating or obstructing the course of justice</td>
</tr>
<tr>
<td>X incites Y to commit perjury X</td>
<td>Subornation of perjury</td>
<td>Incitement to perjury or, if the incitement succeeds, and Y gives actually false testimony, X will be charged as an accomplice to the perjury committed by Y.</td>
</tr>
</tbody>
</table>

**FRAMING OF CHARGES UNDER CODE**

Section 6 of the Sixth Schedule to the Code amends s 146 of the Criminal Procedure and Evidence Act, the section that deals with essentials of indictments, summonses and charges.

The amendment inserts two additional subsections after the existing sub-section 3 as follows—

(4) Where a person is charged with a crime listed in the first column of the Fifth Schedule to the Criminal Law Code, it shall be sufficient to charge him or her with that crime by its name only.

(5) No indictment, summons or charge alleging the commission of a crime mentioned in subsection (4) shall be held to be defective on account of a failure to mention the section of the Criminal Law Code under which the crime is set forth.

The Second Schedule sets out a list of crimes in the Code and the sections of the provisions in the Code defining these various crimes.

Although it is not mandatory or a fatal defect to omit reference in a charge to the relevant section in the Code defining the crime in question, it is obviously good practice to cite the relevant section of the Code in the charge.

For guidance of the police officers and prosecutors a series of Specimen Indictments are to be found at the end of this commentary.
PRELIMINARY MATTERS

Interpretation of terms

[s 2]

This section provides definitions of various terms used in the Code. These definitions will be referred to when dealing with the relevant specific topics in the Commentary.

Replacement of Roman-Dutch law

[s 3(1)]

Previously the criminal law of Zimbabwe comprised the non-statutory (common law) Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10 June 1891, as subsequently added to or amended by legislation.

Section 3(1) of the Code provides that Roman-Dutch criminal law as subsequently modified in Zimbabwe, no longer applies within Zimbabwe where the Code has expressly or impliedly

- enacted the common law in the Code;
- re-enacted statutory provisions in the Code;
- repealed aspects of the previous law;
- amended or modified aspects of the previous law.

It should be noted that the Code codifies the main aspects of the Criminal Law.

Interpretation of Code provisions

[s 3(2)]

Our courts will still need to interpret particular aspects of the codified law, fill in its finer details and decide how that law applies to concrete situations.

Guidance from judicial decisions and legal writings

The Code provides that when interpreting any provision of this Code a court may still continue to obtain guidance from judicial decisions and legal writings on relevant aspects of—

- the criminal law that applied in Zimbabwe before the Criminal Code came into operation and still apply in the Code; or
- the criminal law that is or was in force in other countries.

Where Code incorporates the existing law without alteration, or only modifies some aspects of existing law
The Code often incorporates the existing law without alteration or only modifies some aspects of the existing law and leaves intact others. The Zimbabwean courts will continue to be able to refer to previous Zimbabwean case decisions interpreting and applying the pre-existing and unaltered portions of the law to specific situations. That whole body of precedent will obviously still be of importance. This applies both to the common law and statutory crimes. Thus if the Code has simply incorporated a common law or statutory crime without alteration, the courts will continue to be guided by all the previous case law pertaining to that crime. If certain changes have been made to a common law or statutory crime incorporated into the Code, the courts can still refer to the case law relating to the aspects of those crimes that have not changed when incorporated into the Code.

As they have done in the past, our courts will also be able to refer to appropriate case law from South Africa and other countries interpreting such unaltered law.

As they have done in the past, the courts will also be able to refer to the writings of legal writers, both Zimbabwean and foreign writers, commenting upon the law and interpreting how it should be applied in concrete situations.

**Where Code changes pre-existing law**

Especially where the new law has been drawn from the criminal law of another country, such as South Africa, the Zimbabwean courts will be able to refer to appropriate case law from this other country.

The Zimbabwean courts will also be able to refer to appropriate legal writings, by Zimbabwean and foreign writers, commenting upon the new law.
Criminal provisions contained in other legislation

[§ 4]

This provides that, while crimes contained in statutes other than the Code will continue to be enforced in terms of those statutes, certain important matters, such as the determination of an offender’s state of mind, will be resolved by reference to the applicable provisions of this Code.

More specifically this section provides that that Code does not affect the liability, trial and punishment of a person for a crime in terms of enactments other than the Code.

However, unless such enactments expressly provide otherwise, the following provisions of the Code will apply to enactments other than the Code—

- those dealing with the issue of territoriality for jurisdiction purposes;
- those relating to the elements of criminal liability;
- those dealing with threats, incitement, conspiracy and attempt;
- those dealing with participation or assistance in the commission of crimes;
- those dealing with general defences and mitigatory factors;
- those dealing with competent verdicts;
- those dealing with criminal liability of companies and associations and their members, employees and agents;
- those providing that conviction or acquittal is no bar to civil or disciplinary proceedings;
- those dealing with concurrent or alternative charges;
- those dealing with the standard scale of fines.

Jurisdiction for crimes committed inside and outside Zimbabwe

(Territoriality)

[§ 5]

Crimes committed inside Zimbabwe

A Zimbabwean court has jurisdiction to try a crime that was committed wholly inside Zimbabwe.

Crimes committed partly outside Zimbabwe

A Zimbabwean court has jurisdiction to try a crime committed partly outside Zimbabwe if the conduct that completed the crime took place inside Zimbabwe.

Case

In S v Kapurira 1992 (2) ZLR 17 (S) and X, who were both Zimbabwean citizens, had crossed into Mozambique in order to attend a beer drink there. K had allegedly attacked X and had fatally wounded him. X had been taken back to Zimbabwe where he died of bleeding from the wound. When K returned to Zimbabwe he was arrested and charged with murder. The High Court decided that it had jurisdiction to try this case and K appealed against this decision.
On the issue of jurisdiction the Supreme Court held that generally the courts favoured the approach of basing jurisdiction upon place of impact or intended impact. The courts would not readily surrender their jurisdiction especially where the principles of comity and effectiveness were satisfied. The comity principle would be satisfied where there was no danger of offending another state by exercising jurisdiction in the matter and the effectiveness principle would be satisfied where the court is able to reach the people involved and so give effect to its judgment. In the present case jurisdiction had been properly assumed. Although the murderous attack had taken place in Mozambique, a substantial and essential element of the crime, namely the death of the victim, had taken place in Zimbabwe. Both parties involved were Zimbabweans so Zimbabwe was the country most interested in taking action. The principle of comity was satisfied, as there was no risk of offending the Mozambican authorities, courts or people as the crime was of minimal interest to them. The principle of effectiveness was also satisfied because the appellant was under arrest in Zimbabwe.

**Crimes committed wholly or partly outside Zimbabwe**

A Zimbabwean court has jurisdiction to try a crime committed wholly or partly outside Zimbabwe if the crime—

- is crime against public security in Zimbabwe or against the safety of the State of Zimbabwe;
- is a crime that has produced a harmful effect in Zimbabwe;
- is a crime that was intended to produce a harmful effect in Zimbabwe;
- is a crime that was committed with the realisation that there was a real risk that it might produce a harmful effect in Zimbabwe.

**Cases**

In *S v Mharapara* 1985 (2) ZLR 211 (S) M was charged with the theft of the equivalent in Zimbabwe dollars of the foreign money he stole whilst he was based in Belgium and attached to the Zimbabwe Representative Mission. The theft was only discovered after M had left Belgium and returned to Zimbabwe.

On the issue of jurisdiction the Supreme Court held that there is no justification for a rigid adherence to the principle that with the exception of treason only the common law crimes perpetrated within the borders of Zimbabwe are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for having victims even greater. A strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one state or where the place of the crime is fortuitous so far as the harm flowing from the crime is concerned. A more flexible and realistic approach based on the place of impact, or intended impact, of the crime must be favoured. The court held that although all the constituent elements of the theft occurred in Belgium, in particular the obtaining of the money there, the State is nonetheless entitled to proceed upon the present indictment and adduce
evidence at the trial, if such is available, to establish the fact that the harmful effect of the appellant’s crime was felt by the Zimbabwe Government within this country.

In *S v Nkomo* 2007 (1) ZLR 357 (S) the appellant, a Zimbabwean national, went to Botswana, taking a pistol with him. While there he robbed and murdered the owner of a restaurant, using the pistol. He fled to Zimbabwe, bringing with him some of the money he had stolen from the restaurant, as well as the pistol. He was convicted in the High Court. The High Court referred to the Supreme Court the question of whether it had jurisdiction to try the appellant for murder. The High Court also referred the question of whether it would have been competent for the Attorney-General to have charged the appellant with robbery, since the proceeds of the robbery were brought into Zimbabwe.

The court held that there is a trend, followed in Zimbabwe as well as other countries, indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effect, occurred. A more flexible and realistic approach, based on the place of impact, or of intended impact, of the crime, is favoured. On the facts of the present case there was no basis for the assumption of jurisdiction. The connection between the crime and Zimbabwe was far too tenuous to form a basis for assuming criminal jurisdiction by a Zimbabwean court. None of the essential elements of the offence were committed on Zimbabwean soil. There was no harmful impact or effect on Zimbabwe. The fact that the appellant was a Zimbabwean and that any order given by the court would be effective was not sufficient to found criminal jurisdiction in respect of an offence committed outside Zimbabwe’s borders and having no impact in Zimbabwe. The only link or connection with Zimbabwe was that the weapon used in the commission of the crime originated in Zimbabwe and was found in Zimbabwe after the offence. This, either alone or in conjunction with other factors of this case, was not sufficient to found jurisdiction in Zimbabwean courts for an offence that was committed outside its borders. As the appellant was not charged with robbery or theft, there was no basis for the High Court to refer that matter to the Supreme Court.

**Special provisions in enactment**

Section 5(2) of the Code provides that s 5 does not limit the effect of any enactment which:

- regulates the territorial jurisdiction of any court; or
- makes special provision for the trial, conviction and punishment of particular extra-territorial crimes.
ELEMENTS OF CRIMINAL LIABILITY

Criminal Capacity

Sections 6, 7 and 8 deal with the matter of criminal capacity and codify the pre-existing law without significant alteration.

Children below 7

[s 6]

A child below 7 cannot be tried for a criminal offence as he or she is irrebuttably deemed to lack criminal capacity.

Children of 7 or over but below 14

[s 7]

General presumption

A child of or over the age of 7 but below the age of 14 is rebuttably presumed to lack criminal capacity

➢ to form intention (for a crime requiring proof of intention);
➢ to behave in the way that a reasonable adult would have behaved in the circumstances (for a crime requiring proof of negligence).

Rebutting presumption

The State can rebut this presumption by proving that the particular child in question

➢ did have the capacity to form the intention;
➢ did have the capacity to behave as a reasonable adult would have behaved.

In s 230 of the Code, which deals with the defence of minority, it is provided that the presumption of criminal incapacity that applies to a child between the age of 7 and below 14 can be rebutted if, at the time of the commission of the crime for which the child is charged, the child was sufficiently mature-

➢ to understand that his or her conduct was unlawful or morally wrong; and
➢ to be capable of conforming with the requirements of the law.

In deciding whether the child was sufficiently mature to have the required understanding and capacity, the court must take into account all relevant factors including the following—
- the nature of the crime with which the child is charged;
- the child’s general maturity and family background;
- the child’s knowledge, education and experience;
- the child’s behaviour before, during and after the conduct which forms the basis of the charge.

Simply by rebutting the presumption, the State, of course, has not proved that the child had the requisite state of mind. After successfully rebutting the presumption of incapacity, for a crime of intention the State would obviously still have to prove that the child in question did actually form the intention and for a crime of negligence that the child did actually act in a negligent fashion.

*Presumption where crime committed in presence of older person* [s 230(4)]

This provides a further presumption that where a child of 7 or above but below 14 engages in conduct in the presence of an older person whom the child would be expected to obey because that person is so placed as to be able to control the child, it will be presumed until the contrary is proven that the child acted under the compulsion of the older person.

*Attorney-General’s authority required* [s 231]

Section 231 provides that a criminal prosecution can only be instituted against a child who is between 7 and 14 if the Attorney-General has given his or her authority.

---

**Capacity in respect of sexual offences**

*Capacity of boys to commit sexual offences*

There is an *irrebuttable* presumption that a boy under the age of 12 is incapable of sexual intercourse. [s 63(1)] Such a boy cannot therefore be prosecuted for any sexual offence.

A boy of or over 12 but below 14 is presumed to be incapable of performing sexual intercourse unless the contrary is shown on a balance of probabilities. If the presumption is rebutted and the essential ingredients of the sexual offence can be proven, such a boy could be convicted of rape, aggravated indecent assault or indecent assault. [s 63(2)].

*Capacity of young persons to consent to sexual offences*

A young person of or over 12 but below 14 is presumed to be to be incapable of giving consent to sexual intercourse, anal sexual intercourse or other forms of indecent assault unless there is evidence that the young person was capable of giving consent to the sexual act and did give his or her consent to that act. If the presumption is rebutted and the essential elements of the crime can be proven, the young person can be convicted of rape, aggravated assault or indecent assault. [s 64(2)]

Persons of or over the age of 14 have the capacity to consent to sexual acts.
Cases

In S v C (a juvenile) 1997 (2) ZLR 395 (H) a girl of 14 was charged before a magistrate with indecent assault. She was not represented by a legal practitioner nor assisted by a parent or guardian. She pleaded guilty, was convicted and was sentenced to a wholly suspended term of imprisonment. The High Court held as follows—

Where a child is put on trial an enquiry into the child’s age must be made, because from that enquiry many other important considerations flow. If the child was under 14 years at the time of the alleged offence, the first decision is whether there is evidence to displace the presumption that the child did not have criminal capacity. Even if such evidence is available, the next decision is whether as a matter of policy such a young person should be subjected to the might of the criminal justice system. Other methods of dealing with such an offender might be more appropriate. Even if the child is over 14, the circumstances of the case might suggest that he may have acted without forming or being able to form a criminal intent.

The decision as to whether to prosecute a child is in practice reserved for the Attorney-General himself. If authority is not obtained, this is an irregularity, though not one which could justify the upsetting of a conviction. Nevertheless, the practice of obtaining authority has the whole-hearted approval of the High Court. If no authority has been obtained, the magistrate should use his moral and persuasive authority, to ensure that the prosecutor seeks authority from the Attorney-General.

The concept of placing a juvenile on trial before a magistrate is inherently repugnant, particularly a very young one, unrepresented and unassisted by its parents. In a civil proceeding, such a child would be deemed incapable of enforcing or defending its rights. To expect such a child to conduct his own defence in a criminal trial is to expect far too much. It is questionable whether the child would be afforded its constitutional right to a fair trial, without the sympathetic and active involvement of a magistrate assiduous in safeguarding the position of the unfortunate child in such a distasteful milieu.

A court should be extremely slow and reluctant to subject a young person to the punishments prescribed for adults rather than to afford the child the benefit of institutional care. The discretion as to which course to follow cannot be properly exercised if the magistrate does not call for the report and recommendation of a probation officer. While in some cases such a report is unnecessary, in most the failure to receive the report of a probation officer before exposing a child to adult punishment is a serious misdirection.

The conviction was set aside. The court ordered the child to be brought before a juvenile court to be dealt with as a child in need of care.

In S v F (a juvenile) 1988 (1) ZLR 327 (H) a 10-year-old boy was alleged to have raped an 8-year-old girl. Because a child of that age is presumed incapable of committing rape, the State prosecuted him on a charge of indecent assault, in spite of the professional opinion of a probation officer that both the accused and the complainant were still too young either to appreciate the wrongfulness of his action or to understand criminal proceedings. Neither before nor at the trial, despite the accused’s age and the presumption that a child of his age is *doli incapax*, was the question of knowledge by the accused of the wrongfulness of his act investigated. The accused was nevertheless convicted and sentenced to a whipping of four cuts.

The court held that it is wrong, unjust and prejudicial to the interests of the accused and society to prosecute a child where the evidence is that the child will not understand or appreciate the
proceedings. The question of whether or not the accused was actually \textit{doli incapax} not having been investigated, the State could not have discharged the onus on it of showing that the accused knew his act to be wrongful.

The imposition of a whipping, in the face of the probation officer’s report that the accused would not understand the proceedings and his recommendation that the matter be settled under his professional counselling, was barbaric, inherently brutal, cruel, inhuman and degrading.

See also \textit{Guide} pp 32-33 and 151-152.

\begin{center}
\textbf{Persons over 14}
\end{center}

\textbf{[s 8]}

\textit{No presumption of incapacity}

There is no presumption that a person who is of or over the age of 14 does not have capacity to form intention or to behave in the way that a reasonable person would have behaved in the circumstances.

However, although there is no presumption of incapacity, the court may still find that the particular young person of tender years was so immature that he was unable to, and did not, form the requisite intention. See for instance the case of \textit{S v P} 1972 (3) SA 412 (A).

These provisions should be read together with the provisions later in Code dealing with the defence of minority. [ss 230 & 231]
Criminal Conduct

Liability for criminal conduct

This section sets out the essential ingredients of criminal liability for crimes. These are–

- a person is only guilty of a crime that is defined in the Code or any other enactment;
- the person must have committed the crime or be a party to its Commission as provided in the Code or any other enactment;
- the conduct in question must be voluntary conduct; [See Guide p 6]
- unless the crime is a strict liability crime, the conduct must be accompanied by the required blameworthy states of mind;
- the conduct must be unlawful, that is, conduct without lawful excuse.

Acts or omissions

This provides that criminal conduct may consist of either an act or an omission.

Liability for omission

A person is only criminally liable for an omission if–

- the crime in question is defined in such a way as to render failure to act criminal; or
- the person had a legal duty to act positively–
  
  - because X stands in a protective or family relationship to another which required X to protect the life, safety or any other legal interest of the other person;
  
  - because by his or her prior conduct X has created a situation which endangered another’s life, safety or legal interest;
  
  - because X has by contract or otherwise assumed control over a situation which endangered another’s life, safety or legal interest, whether that situation was created by X or someone else;
  
  - because X holds a public office or calling.

Causation in relation to omission

Even where there was a legal duty to act positively, it must be proven that had the person under the legal duty acted as required by law, the criminal consequence would not have ensued. In other words there must be a causal link between the failure to act and the end result. Thus if X is
charged with culpable homicide it must be proven that had X fulfilled his or her legal duty the death would not have ensued. In the case of *S v Chipinge Rural Council* 1988 (2) ZLR 275 (S); 1989 (2) SA 242 (ZS) it had not been proven that if the rural council had provided a person to supervise children swimming at the swimming pool it operated, the child in question would not have drowned. (For the full facts of this case see below.) In the case of *S v Van As & Anor* 1967 (4) SA 594 (A) it was not proven that had the police mounted a search for the missing children, they would have found them in time to prevent them from dying from exposure. (For the full facts of this case see below.)

**Cases**

**Protective relationship/public office**

In *R v Chenjere* 1960 (1) SA 473 (FS) at 482 a man, X, went to live with a woman who had a small child. By going to live in the house with the woman in the house, X was held to have assumed a duty to look after and protect the child and his failure to do so could make him criminally liable.

In *S v Chenjeya & Ors* 1977 (2) RLR 179 X, a prison warder in charge of other warders failed to stop a serious assault on prisoner by the other warders. The prisoner died as a result of the assault combined with bronchia-pneumonia from which he was suffering. X was found guilty of culpable homicide.

In *S v Chipinge Rural Council* 1988 (2) ZLR 275 (S); 1989 (2) SA 242 (ZS) a rural council, maintained a public swimming-pool which was patronised largely by children. The council had not provided a person to supervise the children when they were swimming. One day, D, a 12-year-old girl was found floating in the water, drowned. On the evidence the State had not shown that the council’s negligent failure to provide supervision at the swimming-pool caused the death of the child, since even if a supervisor had been present performing his duties in a responsible and efficient manner, he might well not have noticed that the deceased was in trouble until it was too late. The Council was found not guilty of culpable homicide.

In *S v Van As & Anor* 1967 (4) SA 594 (A) police officers had arrested a person with children. The children absconded and the police were unable to find them after searching. The children died of exposure. It was not proved that a further search would have led to discovery of children. The police officers were found not guilty of culpable homicide.

**Creation of dangerous situation**

In *R v Puttock* 1967 RLR 186 (A) X, a farmer had introduced a lethal protective device to protect his livestock from thefts. This was wiring with a lethal current running through it. An employee died when he touched the wire. X was held to have taken inadequate precautions to protect his employees and he was found guilty of culpable homicide.
In *S v Howard* HH-272-88 X had pursued a group of children who had been trespassing on club premises near a dam. One of the children ran into the dam and X continued pursuing the others. The child in the water got into difficulties and it was alleged that X returned, watched him, and then went away. The child subsequently drowned. The court held that there was no “guilt nexus” between X’s lawful pursuit of the children and the death of the deceased. The evidence did not show that X had specifically driven the deceased into the dam, nor that he ought to have foreseen that the deceased might enter the dam. There was no legal duty on X to do anything when the child got into difficulties in the water.

In *S v Mlambo* 1994 (2) ZLR 410 (S) X, a farmer had put up an electric fence with a lethal current running through it and took inadequate precautions to protect his employees. X was found guilty of culpable homicide in respect of the death of one of his employees who was electrocuted.

**Control over dangerous situation**

*S v Chipinge Rural Council* 1988 (2) ZLR 275 (S); 1989 (2) SA 242 (ZS) (see above)

In *S v Engelbrecht & Ors* 1962 (4) SA 219 (O) X, a captain in charge of a mortar display, had failed to check the ground carefully after the display to ensure that there were no unexploded shells. A person died after stepping on an unexploded mine. X was found guilty of culpable homicide.

In *S v Fernandes* 1966 (2) SA 259 (A) X had assumed control over a caged baboon. The animal had escaped and killed a child. X was found guilty of culpable homicide.

In *S v Russell* 1967 (3) SA 739 (N) X had assumed the duty to pass on a warning about existence of dangerous situation. He had failed to transmit the warning and a death had resulted from this failure. He was found guilty of culpable homicide.

In *S v Grobler* 1974 (2) SA 663 (T) X, a lift operator had fallen asleep after he had started a mine lift. Deaths had resulted after the lift had fallen to the bottom of the shaft. X was found guilty of culpable homicide.

**Statutory duty**

In *S v Blanket Mine (Pvt) Ltd Blanket Mine (Pvt) Ltd* 1991 (1) ZLR 227 (S) the mine had failed to provide a serviceable face mask for the deceased, a cyanide plant assistant, who apparently fell asleep when doing an unexpected extra shift and died from inhaling cyanide gas. The failure to provide an adequate facemask was a breach both of the duty of care created by statute and of the standard of care required by law. The mining company was found guilty of culpable homicide.

See the following cases on civil liability for omissions *Minister of Police v Ewels* 1975 (3) SA 590 (A) (a policeman has a legal duty to stop an assault). See also *Minister of Law and Order v*
Kadir 1995 (1) SA 303 (A) and Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA) (Civil liability of police for allowing serial rapist to escape.)

However, caution must be exercised when seeking to use civil cases in this area as it has been correctly pointed out that in the area of criminal law the principle of legality demands that criminal offences must be laid down in advance in reasonably clear and precise terms and that the legislature and not the courts create new criminal offences. Thus any expansion the ambit of criminal liability for omission should be the domain of the legislature and not the courts.

---

**Causation**

[s 11]

X can only be criminally liable if he or she caused or substantially contributed to its occurrence.

To prove that X caused or substantially contributed to the occurrence the State has to prove that X was both the factual and the legal cause of the end result.

**Factual cause**

The test for factual cause is a wide one. The question asked is simply whether but for X’s conduct would the consequence have occurred? This is referred to as *causa sine qua non*. If the consequence would have occurred even without X’s conduct, X is not causally responsible. Applying this test alone would make X liable on an unreasonably over-extended basis. So to limit causal responsibility within reasonable limits, a second test is applied after factual cause has been established, namely the test for legal cause.

**Legal cause**

For legal cause the question asked is whether on a common sense basis looking back over what occurred it was reasonably foreseeable that X’s conduct would lead to that consequence. The causal link would not be broken by a new cause that supervened after X had engaged in the conduct, provided it was reasonably foreseeable that the subsequence event would occur after X’s conduct.

For a case dealing with the distinction between factual and legal cause see S v Zvimire & Anor HH-336-83.

**Guidelines** [s 53]

Later in the Code in s 53 a series of guidelines are provided to assist in determining the often difficult question of whether a person can be found at law to have caused the death of another for the purposes of the crimes of murder and culpable homicide.

**Cases**

In *R v Cox A-181-74* D who was drunk had been knocked down and injured. He was lying on the road and being attended to by passers-by. X drove out of a nearby motel without his lights. He drove straight over D despite torch being flashed at him to warn him. The court held that X’s actions contributed substantially to the death and he was guilty of culpable homicide.
In *S v Musindo* A-132-78 X had not stopped his vehicle at a roadblock. The police had fired at the vehicle and a passenger was killed. X was held to be criminally responsible for the passenger’s death. He was found guilty of culpable homicide.

However, in *S v Machembo* 2008 (1) ZLR 1 (H) X was driving a lorry on a main road at night. The lorry carried several passengers. X was stopped at a police road block; he was told by the police to go to the nearest police station because the vehicle had no tail lights. He instead drove off, resulting in the police giving chase and erecting another road block to stop him. He did not stop there either. A police officer fired two warning shots into the air and when the vehicle failed to stop he fired at the vehicle, killing one of the passengers. X was charged with and convicted of culpable homicide. It was alleged that by failing to obey the order to stop, he acted negligently and that this negligence caused the death of one of his passengers. It was held that a conviction for culpable homicide is founded, firstly, on proof of negligent conduct and, secondly, on the foreseeability of death arising from that conduct. The concept of foreseeability is sometimes expressed as the natural and probable consequence or as the direct result of the act or omission that the accused fails to guard against which results in death. In the present case, X took a deliberate and conscious act to disobey the police. His actions in failing to stop were grossly negligent. He was therefore negligent in that he created a dangerous situation by driving off from the road block instead of stopping as directed by the police. However, the State case fell on the aspect of the foreseeability of death arising from X’s failure to obey the instruction to stop. Whether or not he was aware that the police who stopped him before the shooting were armed, a reasonable person would not expect an armed policeman to shoot at a moving lorry with passengers at the back in a bid to stop the driver. The death of the deceased was thus caused by the policeman and not by X’s manner of driving. It was neither the direct result nor the natural and probable consequence of his failure to obey the police instruction to stop.

*Action taken by victim for self-preservation*

In *R v Sikona* 1937 SR 54 the court dealt with issue whether action taken by a victim for purpose of self-preservation can break the causal link.

In *R v McEnery* 1943 SR 158 (H) a victim jumped out of moving train to escape an assault by a soldier. The act of victim was done for the purpose of self-preservation. Nonetheless X was found not guilty of culpable homicide. Compare this case with the English case of *R v Roberts* (1971) 56 CAR 95 the court held that the victim's act of jumping out of moving vehicle was reasonably foreseeable in the circumstances. (See Glanville Williams *Textbook of Criminal Law* pp 333-334)

In *R v John* 1969 (2) RLR 23 (A); 1969 (2) SA 560 (RA) X had pursued D with intent to kill her. She fell into a pool of water and drowned. X was found guilty of culpable homicide as the subsequent situation of the person fleeing falling into the pool and drowning was within the range of ordinary human experience.

*Medical treatment after injury*
In *R v Mubila* 1956 (1) SA 31 (SR) at 33 X had inflicted a wound upon D. D failed to follow medical advice and died. Had he followed the medical advice he would not have died. X was still held liable for the death.

In *R v Mabole* 1968 (2) RLR 159 (G); 1968 (4) SA 811 X stabbed D who was taken to hospital. The doctor concluded that none of the wounds was penetrating. Later D showed signs of loss of blood-pressure and a raised pulse rate. To determine the cause, exploratory surgery was undertaken. As a result of the surgery, D developed a fatal pulmonary embolism. The court held that there was no break in the causal chain. It was a reasonably predictable consequence of the attack that D would require medical attention and, in the present state of medical knowledge, mistakes in diagnosis and treatment are a commonplace. Provided that medical attention is given bona fide and with reasonable efficiency, X cannot complain of such mistakes.

In *S v Rahman* S-178-82 X had struck D on the head with a piece of wood. The doctors subsequently failed to detect internal bleeding. D died. The court held that the subsequent failure to detect the bleeding did not snap the causal link and X was found guilty of culpable homicide.

In *S v Rukonkunda* S-27-85 X shot an elderly woman in the hip. She was taken to hospital where she was bedridden. The woman died. The death certificate indicated that the cause of death was bronchial pneumonia. There was not medical negligence. The court decided that there was no snap in the causal link and that X was guilty of murder.

In *S v Tembani* 2007 (2) SA 291 (SCA) X shot his girlfriend twice. One bullet entered her chest penetrating the lung and abdomen and perforating her duodenum. The other shot hit her in the leg. She was treated in hospital but died two week later of septicaemia. The court pointed out that without medical treatment, the gunshot wounds would have been fatal. The wounds were intrinsically dangerous. Normally A is liable even if wound readily treatable and even where there was negligent medical treatment unless the victim had so recovered that the original injury was no longer posing a danger to life. The court held that the negligent medical treatment did not break the causal link between the murderous assault and the death. Medical resources in the country are sparse and badly distributed. Therefore improper medical treatment is neither abnormal nor extraordinary and supervening negligent treatment did not exculpate X on a charge of murder.

*Thin skull rule*

In *R v Dikwi* 1940 SR 19 D had a thin skull. The blow to the head caused the death of D. This blow would not have killed a person with a normal skull. X was found guilty of culpable homicide.

In *R v Mara* 1965 RLR 494 (G) X assaulted D severely and this led, D, who had a weak heart to die of a heart attack. X was found guilty of culpable homicide.

In *S v Chirau & Ors* A-180-78 prior to the assault D had had a perforated bowel. A moderate blow to the stomach had caused death. The accused were found guilty of culpable homicide.
In *S v Ncube* GB-47-80 during a minor tussle one of the people involved, D, suffered haemorrhaging into lung cavity probably precipitated by exertion of struggle combined with tubercular condition from which deceased suffered. The court held that the thin skull rule did not apply as death was not reasonably foreseeable in the circumstances.

In *S v Van As* 1976 (2) SA 921 (A) X was found not guilty of culpable homicide where he had slapped fat man hard across face and the man had fallen backwards, hitting his head on a concrete floor. The man had died from head injuries to his head caused by the fall onto the concrete floor.

See also *R v John* 1969 (2) RLR 23 (A); 1969 (2) SA 560 (RA) at 571 F-H

States of Mind

Crimes contained in Code
[ss 12-16 as read with definitions of words “intend”, “know” and “realise” in s 2]

This Part deals with states of mind or, in other words, the mental ingredient of crimes. All crimes except strict liability crimes require proof of some mental ingredient.

In the past the Latin tag, mens rea, was used to refer to the state of mind or mental element. The literal translation of mens rea is “guilty mind”.

The two main mental states are intention and negligence.

Intention
[s 13]

Where intention is an essential ingredient of a crime, the State must prove that X had the requisite intention.

Some crimes require proof of intention to cause a particular consequence. Thus for murder the State must prove X intended to cause the death of a person. Some crimes require proof of knowledge of a circumstance. Thus for rape the State must prove that the accused knew that the female person had not consented to sexual intercourse.

Prior to the Code intention was subdivided intention into actual intention and legal intention. Legal intention was also known as constructive intention or recklessness. With a crime of intention X could be convicted on the basis either of actual or legal intention.

The tests applied for actual and legal intention were as follows—

For crime requiring proof of an intention to cause a consequence—

- X would have actual intention if he or she set out to cause the consequence or X engaged in conduct which he or she foresaw was certain or substantially certain to cause that consequence; (See the case of S v Mugwanda 2002 (1) ZLR 574 (S)).

  or

- X would have legal intention if he or she engaged in conduct which he or she foresaw might possibly result in the consequence and, having foreseen this, he or she continued with the conduct reckless as to whether the consequence ensued.

For crime requiring knowledge of a circumstance—

- X would have actual intention regarding the circumstance if he or she knew that the circumstance existed or was substantially certain it did exist;
X would have legal intention regarding the circumstance if he or she foresaw the possibility that it did exist and, having foreseen this, continued to engage in the conduct reckless as to whether or not it existed.

Although the substance of these tests for intention remains, some modifications have been made.

Firstly, intention and knowledge are dealt with separately. Both are defined as subjective concepts. With intention section 13 provides that the test is whether X intended to engage in conduct or produce the consequence. Section 14 provides that where knowledge is an element of a crime, the test is whether X had knowledge of the relevant fact or circumstance. The underlying idea behind this is to try to make it easier to distinguish between those crimes that require “intention” and those that require “knowledge” as one of their elements.

Secondly, the test for legal intention has been re-worded. Instead of asking the question did X foresee the possibility of a consequence or of a circumstance existing, the question will be formulated in this way—

*For crime requiring proof of an intention to cause a consequence—*

X would have legal intention if he or she engaged in conduct realising that there was a real risk or possibility (not merely a remote risk or possibility) that his conduct might cause the consequence and, having realised this, X continued to engage in the conduct reckless as to whether or not the consequence ensued.

*For crime requiring proof of intention in relation to a relevant fact or circumstance—*

X would have legal intention if he or she engaged in conduct realising that there was a real (not merely a remote) risk or possibility that the relevant fact or circumstance might exist and, having realised this, X continued to engage in the conduct reckless as to whether or not the relevant fact or circumstance existed.

The reason why the test for legal intention has been re-worded by substituting the words “realising that there was a real risk or possibility” is that this wording would be more understandable and make the test easier for the courts to apply. A “real risk or possibility” is required because X should not be convicted of a crime of intention on the basis of legal intention if there was only a remote risk or possibility that the harm might eventuate or the relevant fact or circumstance might exist.

**General intention**

Although this is not specifically referred to in the Code, it is clear that the courts can use this as a basis for liability. Where X does not have a particular person in mind, as for instance, where X throws a bomb into a crowd of people or derails a passenger train, X is guilty of murder as X knows that people will be killed. It is immaterial that X does not know the identities of those killed. If X plants a bomb under the chair of a dignitary who is intending to kill him and X knows that the bomb will kill not only the dignitary but also the people around him, X is guilty of murder in respect of all the people who have been killed by the bomb blast.
Negligence

Negligence is different from intention. Strictly speaking negligence is not a state of mind but rather the absence of a state of mind. With a crime of negligence the State must prove that X behaved in an unreasonable way. Thus for culpable homicide (negligent killing) that State must prove, not that X intended to cause the death, but that he engaged in conduct that a reasonable person would not have and that conduct caused death.

Previously in our law culpable homicide was only committed when X negligently failed to foresee and guard against death. The Code has added a further type of culpable homicide which may be referred to as advertent or conscious negligence. Advertent negligence applies where X appreciates that there is risk of death, but rather than taking a conscious risk which would have meant that he or she would have intention to kill, X negligently fails to guard against the risk. (See s 49).

In practice it will be extremely difficult to differentiate between legal intention and conscious negligence.

Statutory crimes not contained in Code

This section provides guidance on how to apply the tests referred to in ss 13 to 16 to assessing the state of mind of persons accused of committing statutory crimes created by enactments other than this Code. The states of mind contained in ss 13-16 are intention, knowledge, realisation of a risk and negligence.

Interpretation of words in other statutes [s 17(2)]

<table>
<thead>
<tr>
<th>Word or phrase</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>intentionally</td>
<td>The State must prove intention in terms of s 13 or, if this cannot be proved, realisation of a real risk or possibility in terms of s 15.</td>
</tr>
<tr>
<td>intend</td>
<td></td>
</tr>
<tr>
<td>with intent to</td>
<td></td>
</tr>
<tr>
<td>deliberately</td>
<td></td>
</tr>
<tr>
<td>purposely</td>
<td></td>
</tr>
<tr>
<td>for the purpose of</td>
<td></td>
</tr>
<tr>
<td>maliciously</td>
<td></td>
</tr>
<tr>
<td>mischievously</td>
<td></td>
</tr>
<tr>
<td>wantonly</td>
<td></td>
</tr>
</tbody>
</table>
wilfully
dishonestly
corruptly
fraudulently
and any related or
derivative expression

<table>
<thead>
<tr>
<th>Word</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>knowing</td>
<td>The State must prove knowledge in terms of s 14 or, if this cannot be proved, realisation of a real risk or possibility in terms of s 15.</td>
</tr>
<tr>
<td>knowingly</td>
<td></td>
</tr>
<tr>
<td>and any related or derivative expression</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Word</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>recklessly</td>
<td>The State must prove realisation of a real risk in terms of s 15.</td>
</tr>
<tr>
<td>and any related or derivative expression</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Word</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>negligently</td>
<td>The State must prove negligence in terms of s 16.</td>
</tr>
<tr>
<td>carelessly</td>
<td></td>
</tr>
<tr>
<td>unskilfully</td>
<td></td>
</tr>
<tr>
<td>and any related or derivative expression</td>
<td></td>
</tr>
</tbody>
</table>

**Crimes for which test of realisation of real risk or possibility can be applied [s 17(4)]**

Section 17(4) provides that the kinds of crimes to which the test of realisation of the real risk can be applied are–

- a crime requiring proof that a particular consequence has occurred;
- a crime requiring proof of the existence or absence of particular circumstances.

**Strict liability [s 17(5)]**
A strict liability crime is one where X is liable even though X acted neither intentionally or
negligently. In other words the State does not have to prove any mental element and X is liable
simply on the basis that X committed the prohibited conduct.

It should be noted that strict liability is not the same as absolute liability. Although the State does
not have to prove that X acted intentionally or negligently, the defence can still raise defences
affecting lawfulness such as necessity, impossibility and authority and also defences such as lack
of criminal capacity or involuntary conduct.

Legislature expressly creating strict liability

The legislature can expressly provide that the crime is to be a strict liability crime.

Legislature impliedly creating strict liability

What happens if the legislature does not expressly state that the offence in question is a strict
liability offence, but the statutory provision contains no words that specify that a state of mind
required for the offence concerned, that is it uses no words indicating that intention, knowledge,
realisation of risk or negligence is required? The question then is whether the legislature
impliedly intended this offence to be a strict liability offence.

Section 17(5) provides that an offence will be interpreted as a strict liability offence if

> requiring proof of a mental element for that offence would render the detection or
prosecution of the offence impossible or practically impossible; or

> the offence’s object would be defeated if proof of a mental element were to be required.

However, even if these two criteria apply, the court must not hold that the legislature impliedly
intended strict liability if the penalty for the offence is mandatory imprisonment or imprisonment
without the option of a fine.

These guidelines are taken from the case S v Zemura 1973 (2) RLR 357 (A) as approved by S v
Zimbabwe United Freight Company Ltd. 1990 (1) ZLR 138 (S).

See also S v Muchingura HH-264-84 and S v Maceys of Salisbury Ltd 1982 (2) ZLR 239 (S)
(statute on contamination of foodstuffs)

See Guide pp 128-129.

Attitude of courts to strict liability

In the Maceys case the Supreme Court questioned the need for strict liability and pointed out that
it would usually be possible to enforce the statute by requiring at least negligence. It said that
there was a growing tendency on the part of the courts to interpret statutory offences as requiring
some fault element. This approach, however, could not be applied to pre-existing legislation as
this may frustrate the intention of the legislature. See also the trenchant criticism of the concept of
strict liability in Burchell and Milton Criminal Law (Second edition) pp 371-376. The authors
conclude that because strict liability deprives the accused of the opportunity of raising a defence
excluding fault, strict liability can “hardly be seen as justifiable in an open and democratic society
based on human dignity, equality and freedom, particularly when the possibility of the middle
course of negligence based liability exists.”
Proof of Criminal Liability

Burden and standard of proof

[§ 18]

Standard of proof [§ 18(1)]

In order to obtain a conviction the State must prove the guilt of the accused beyond reasonable doubt. This is a higher standard of proof than the one that obtains in civil cases (proof on a balance of probabilities).

Shifting of burden [§ 18(2) and (3)]

An enactment may impose upon a person charged with a crime the burden of proving any particular fact or circumstance, but where it does so the person charged may discharge this burden by proving the fact or circumstance on a balance of probabilities.

Defences [§ 18(4)]

Where there is some evidence before the court that raises a defence to a criminal charge, whether or not that evidence was introduced by the accused, the prosecution must disprove the defence to a charge beyond a reasonable doubt, except where the defence relates to insanity or any abnormality of the mental state of the accused, in which case the accused has the burden of proving the defence on a balance of probabilities.

In *S v Mapfumo & Ors* 1983 (1) ZLR 250 (S) the Supreme Court clarified the matter of onus in relation to defences. It pointed out that there was no onus as such upon X to establish some defence. Once there is some material, whether adduced by the defence or emerging from the prosecution case, suggesting that such certain defence may be available the Court must consider the defence. Evidence sufficient to raise a defence does not have to be evidence sufficient to establish the factual basis on a balance of probabilities; all that is required is that there be sufficient material evidence to make it a realistic issue and this evidence could emerge from the State case, from X’s confession, from the cross-examination of State witnesses or from evidence from the defence. Thus once there is a sufficient foundation for the defence from whatever quarter this evidence comes, the onus rested squarely on the prosecution to prove that the defence does not apply.

In respect of the defence of insanity, an insane person is obviously incapable of proving his or her insanity. What will happen is that the defence will lead psychiatric evidence to establish that the accused was insane at the time he or she committed the crime. A verdict of not guilty by reason of insanity will then be returned in terms of § 29(2) of the Mental Health Act.
There is now a standard scale of fines set according to the level of the fine. This standard scale can be amended from time to time

<table>
<thead>
<tr>
<th>Level</th>
<th>Monetary Amount in dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>500,00</td>
</tr>
<tr>
<td>2</td>
<td>1,200,00</td>
</tr>
<tr>
<td>3</td>
<td>2,500,00</td>
</tr>
<tr>
<td>4</td>
<td>5,000,00</td>
</tr>
<tr>
<td>5</td>
<td>10,000,00</td>
</tr>
<tr>
<td>6</td>
<td>20,000,00</td>
</tr>
<tr>
<td>7</td>
<td>40,000,00</td>
</tr>
<tr>
<td>8</td>
<td>60,000,00</td>
</tr>
<tr>
<td>9</td>
<td>75,000,00</td>
</tr>
<tr>
<td>10</td>
<td>100,000,00</td>
</tr>
<tr>
<td>11</td>
<td>125,000,00</td>
</tr>
<tr>
<td>12</td>
<td>150,000,00</td>
</tr>
<tr>
<td>13</td>
<td>200,000,00</td>
</tr>
<tr>
<td>14</td>
<td>250,000,00</td>
</tr>
</tbody>
</table>

CRIMES

Crimes Against the State

Sections 19 to 34 are concerned with crimes against the State. Except for the common law crime of treason and the statutory crime of unlawful possession or wearing of camouflage uniforms, the other crimes against the State have been taken from the Public Order and Security Act (“POSA”) and incorporated with certain modifications. (The public order offences in POSA, such as public violence and other crimes relating to public gatherings, are incorporated into the Code as public order offences.)

Definition of terms relating to crimes against the State [s 19]

<table>
<thead>
<tr>
<th>Word or phrase</th>
<th>Meaning</th>
</tr>
</thead>
</table>
| act of insurgency, banditry, sabotage or terrorism | An act committed by a person the purpose of—
  ➢ causing or furthering an insurrection in Zimbabwe; or
  ➢ causing the forcible resistance to the Government or the Defence Forces or any law enforcement agency; or
  ➢ procuring by force the alteration of any law or policy of the Government;
  which act is accompanied by the use or threatened use of weaponry with the intention or realising that there is a real risk or possibility of—
  ➢ killing or injuring any other person; or
  ➢ damaging or destroying any property; or
  ➢ inflicting substantial financial loss upon any other person; or
  ➢ obstructing or endangering the free movement in Zimbabwe of any traffic on land or water or in the air; or
  ➢ disrupting or interfering with an essential service. |
| bomb | ➢ any device consisting of or carrying an explosive charge or fused to detonate upon impact or percussion or through a timing contrivance or by an electrical or electronic device; or
  ➢ any other device capable of causing an explosion; |
<p>| essential service | ➢ any service relating to the generation, supply or distribution of electricity; |</p>
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>any fire brigade or fire service;</td>
<td></td>
</tr>
<tr>
<td>any health, hospital or ambulance service;</td>
<td></td>
</tr>
<tr>
<td>any service relating to the production, supply, delivery or distribution of fuel;</td>
<td></td>
</tr>
<tr>
<td>any service relating to the supply or distribution of water;</td>
<td></td>
</tr>
<tr>
<td>any communications service;</td>
<td></td>
</tr>
<tr>
<td>any transport service;</td>
<td></td>
</tr>
<tr>
<td>any other service or occupation whose interruption would endanger the life, health or safety of the whole or a part of the population and which the Minister may declare by notice in a statutory instrument to be an essential service.</td>
<td></td>
</tr>
<tr>
<td>insurgent, bandit, saboteur or terrorist</td>
<td>a person who—</td>
</tr>
<tr>
<td></td>
<td>- is about to commit, is committing or has committed an act of insurgency, banditry, sabotage or terrorism; or;</td>
</tr>
<tr>
<td></td>
<td>- has attended a course or undergone training, is about to attend a course or undergo training or is attending a course or undergoing training as an insurgent, bandit, saboteur or terrorist.</td>
</tr>
<tr>
<td>law enforcement agency</td>
<td>the Police Force (including a member of the Police Constabulary as defined in section 2 of the Police Act; or</td>
</tr>
<tr>
<td></td>
<td>an intelligence service maintained by the Government; or</td>
</tr>
<tr>
<td></td>
<td>any agency assigned by an enactment to maintain and enforce the law.</td>
</tr>
<tr>
<td>offensive material</td>
<td>any inflammable, dangerous, noxious, or deleterious substance, material or thing capable of killing or injuring persons, including—</td>
</tr>
<tr>
<td></td>
<td>- low or high explosives and the ingredients thereof;</td>
</tr>
<tr>
<td></td>
<td>- all types of fuse used in the ignition of explosives;</td>
</tr>
<tr>
<td></td>
<td>- detonators;</td>
</tr>
<tr>
<td></td>
<td>- timing devices, especially time pencils;</td>
</tr>
<tr>
<td></td>
<td>- wire cutters;</td>
</tr>
<tr>
<td></td>
<td>- concentrated or other harmful acids;</td>
</tr>
<tr>
<td></td>
<td>- ammunition as defined in the Firearms Act;</td>
</tr>
<tr>
<td></td>
<td>- biological or chemical warfare agents;</td>
</tr>
<tr>
<td></td>
<td>- any other substance, material or thing declared by the Minister, by notice in a statutory instrument, to be an</td>
</tr>
</tbody>
</table>

33
| Official | a member of any law enforcement agency;  
|         | an ancillary member of the Police Force as defined in section 2 of the Police Act;  
|         | a member of the Defence Forces;  
|         | a provincial or district administrator or an assistant provincial or district administrator or any other employee of the State acting in that capacity. |
| Publication | includes a document, book, magazine, film, tape, disc, electronic publication or other material or thing whatsoever in which, on which or by means of which a statement may be made. |
| Statement | any expression of fact or opinion, whether made orally, in writing, electronically or by visual images. |
| Weaponry | any of the following kinds of offensive material—  
|         | artillery of all kinds;  
|         | a firearm or other apparatus for the discharge of bullets or other kinds of projectiles which are designed to be lethal, whether solid, explosive or gas diffusing;  
|         | a flame-thrower;  
|         | high or low explosive, whether or not manufactured as a bomb, grenade or similar missile or device and whether capable of use with a firearm or not, including a fuse, detonator or timing device therefor;  
|         | biological or chemical warfare agents;  
|         | any other offensive material declared by the Minister, by notice in a statutory instrument, to be an offensive material for the purposes of this definition. |

**Treason**

[s 20]

This provides for a simple definition of treason that avoids the complexity that arises from using the concept of *majestas*. (For a state to have *majestas* it must not just have the trappings of statehood; the state must be independent and sovereign.)

*Ingredients* [s 20(1)]
Physica

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X, who is a citizen or person ordinarily resident in Zimbabwe;</td>
<td>Does act, or incites or conspires to do act with the intention of overthrowing the Government.</td>
</tr>
<tr>
<td>➢ inside or outside Zimbabwe;</td>
<td></td>
</tr>
<tr>
<td>➢ does any act or</td>
<td></td>
</tr>
<tr>
<td>➢ incites such an act or</td>
<td></td>
</tr>
<tr>
<td>➢ conspires with one or more other people to commit such an act</td>
<td></td>
</tr>
</tbody>
</table>

Acts of treason [s 20(2)]

The Code provides a non-exhaustive list of acts constituting treason. These are—

➢ preparing or endeavouring to carry out by force any enterprise which usurps the executive power of the President or the State in any matter;

➢ in times of war or during a period of public emergency, doing anything which assists any other State to engage in hostile or belligerent action against Zimbabwe.

Lawful acts not constituting treason [s 20(3)]

It is further provided, however, that it is legally permissible (and cannot constitute treason) for a person to do anything by lawful constitutional means that is directed at—

➢ correcting an error or defect in the system of Government or Constitution; or

➢ replacing the Government or President;

➢ achieving the adoption or abandonment of policies or legislation; or

➢ altering of any matter established by the law of Zimbabwe.

Penalty [s 20(1)]

Death or imprisonment for life.

The maximum penalty for treason of death or life imprisonment reflects the gravity of this crime.

Case

The case of S v Tsvangirai & Ors 2004 (2) ZLR 210 (H) is the leading case on treason. This case was decided on the basis of the common law crime of treason.

Two witness rule

This rule is contained in s 269 of the Criminal Procedure and Evidence Act which provides that it is not lawful for a court to convict a person charged with treason “except upon the evidence of two witnesses where one overt act is charged in the indictment or, where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act.”

This rule is a safeguard against false accusations of treason.
In *S v Tsvangirai & Ors* 2003 (2) ZLR 88 (H) Garwe JP set out the special evidentiary rules relating to treason as follows—

It is not competent for a court to convict a person of treason except on the evidence of two witnesses for each “overt act” charged or, where two or more overt acts are charged, one witness for each overt act. There would be no compliance with the Act if, in a case where more than one overt act is charged and there is only one witness, the same witness were to give evidence on each of the overt acts. Where one overt act is charged at least two witnesses must give evidence on the overt act, although the evidence need not overlap. Where the court is relying on the evidence of only two witnesses to prove the whole overt act, the evidence of each of those witnesses must be such that, standing alone, it would, if believed, be adequate to establish that the accused committed the overt act of treason with which he is charged.

An overt act is any act manifesting the criminal intention and tending towards the accomplishment of the criminal object. It is generally a composite thing, passing through distinct stages and made up of various circumstances. Several witnesses speaking to those different stages and circumstances may be necessary.

*Competent verdicts on charge of treason* [s 275 read with 4th Schedule]

- Attempted murder;
- Concealing treason;
- Subverting constitutional government;
- Insurgency, banditry, sabotage or terrorism;
- Possessing weaponry for insurgency, banditry, sabotage or terrorism;
- Any crime of which a person might be convicted if he or she were charged with any of the crimes above.

---

**Concealing treason**

[s 21]

Under the common law concealing treason was chargeable as treason. In the Code it has been made a crime separate from treason because almost invariably concealing treason attracts a lesser penalty than treason.

**Ingredients**

X commits this crime if—

- X is a citizen or is ordinarily resident in Zimbabwe;
- X knowing that another person, inside or outside Zimbabwe, has committed, is committing, is attempting to commit treason or intends to commit treason;
- fails to inform the authorities as soon as is reasonably possible after acquiring such knowledge.


**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Up to 20 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts on charge of concealing treason** [s 275 read with 4th Schedule]

- Harbouring, concealing or failing to report insurgent, bandit, saboteur or terrorist.

---

**Subverting constitutional government**

[s 22]

This re-enacts s 5 of POSA which section had re-enacted the provision for the preservation of constitutional government previously contained in the repealed Preservation of Constitutional Government Act.

**Definitions** [s 22(1)]

<table>
<thead>
<tr>
<th>Words</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>coercing</td>
<td>means constraining, compelling or restraining by–</td>
</tr>
<tr>
<td></td>
<td>• physical force or violence or, if accompanied by physical force or violence or the threat thereof, boycott, civil disobedience or resistance to any law, whether such resistance is active or passive; or</td>
</tr>
<tr>
<td></td>
<td>• threats to apply or employ any of the means above.</td>
</tr>
<tr>
<td>unconstitutional means</td>
<td>means any process which is not a process provided for in the Constitution and the law.</td>
</tr>
</tbody>
</table>

**Ingredients** [s 22(2)]

X commits this crime if X–

- inside or outside Zimbabwe;
- organises or sets up or advocates, urges or suggests the organisation or setting up of, any group or body;
with a view to that group or body—

- overthrowing or attempting to overthrow the Government by unconstitutional means; or
- taking over or attempting to take over Government by unconstitutional means or usurping the functions of the Government; or
- coercing or attempting to coerce the Government.

X also commits this crime if X supports or assists any group or body in doing or attempting to do any of these things.

**Penalty** [s 22(2)]

Imprisonment for up to 20 years without option of fine.

**Competent verdicts on charge of subverting constitutional government** [s 275 read with 4th Schedule]

- Causing disaffection among Police Force or Defence Forces.

---

**Insurgency, banditry, sabotage or terrorism**

[s 23]

This re-enacts s 6 of POSA.

**Ingredients** [s 23(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
</table>
| X commits act accompanied by use or threatened use of violence For purpose of 
  - causing or furthering an insurrection in Zimbabwe; or 
  - causing the forcible resistance to the Government or the Defence Forces or any law enforcement agency; or 
  - procuring by force the alteration of any law or policy of the Government | Does act with the intention or realising that there is a real risk or possibility of— 
  - killing or injuring any other person; or 
  - damaging or destroying any property; or 
  - inflicting substantial financial loss upon any other person; or 
  - obstructing or endangering the free movement in Zimbabwe of any traffic on land or water or in the air; or 
  - disrupting or interfering with an essential service. |

**Penalty** [s 23(1)]

<table>
<thead>
<tr>
<th>Where the act of insurgency, banditry, sabotage or terrorism results in the death of a person</th>
<th>Any other case</th>
</tr>
</thead>
</table>
Where any act of insurgency, banditry, sabotage or terrorism does not result in any of these consequences the competent charge will be one of attempting to commit an act of insurgency, banditry, sabotage or terrorism.

**Competent verdict on this charge** [s 275 read with 4th Schedule]

- Possessing weaponry for insurgency, banditry, sabotage or terrorism;
- Recruiting or training insurgents, bandits, saboteurs or terrorists;
- Hijacking;
- Attempted murder;
- Rape;
- Robbery;
- Malicious damage to property;
- Public violence;
- Any crime of which a person might be convicted if charged with any of the crimes above.

**Case**

In *S v Bennet* HH-79-2010 X was charged with possession of weaponry for insurgency, banditry, sabotage or terrorism and incitement to commit in insurgency. The charges were brought under the Public Order and Security Act as the Criminal Law Code was not yet in operation. X was acquitted.

---

**Recruiting or training insurgents, bandits, saboteurs or terrorists**

[s 24]

This re-enacts s 7 of POSA.

**Ingredients**

This crime is committed where X intentionally—

- recruits, assists or encourages another to undergo training inside or outside Zimbabwe in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe; or
- provides training to a person, whether inside or outside Zimbabwe, in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe.

**Penalty**

Imprisonment for life or any shorter period.

**Competent verdicts on this charge** [s 275 read with 4th Schedule]
- Training as insurgent, bandit, saboteur or terrorist;
- Supplying weaponry to insurgents, bandits, saboteurs or terrorists;
- Harbouring, concealing or failing to report insurgent, bandit, saboteur or terrorist;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

**Training as insurgent, bandit, saboteur or terrorist**

[s 25]

This re-enacts s 8 of POSA.

*Ingredients* [s 25(1)]

X commits this crime if X—

- attends or undergoes any course of training inside or outside Zimbabwe;
- for the purpose of enabling X to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe.

*Presumption* [s 25(2)]

If the prosecution proves that—

- X attended or underwent a course of training the effect of which was to enable that person to commit an act of insurgency, banditry, sabotage or terrorism in Zimbabwe,

it will be presumed, unless the contrary is proved, that he or she did so for that purpose.

*Penalty* [s 25(1)]

Imprisonment for life or any shorter period.

*Competent verdicts on this charge* [s 275 read with 4th Schedule]

- Recruiting or training insurgents, bandits, saboteurs or terrorists;
- Any crime of which a person might be convicted if charged with the crime above.

---

**Supplying weapons to insurgents, bandits, saboteurs or terrorists**

[s 26]

This re-enacts s 9 of POSA.

*Ingredients*

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inside or outside Zimbabwe;</td>
<td>Supplies weapons knowing that weaponry will be used in the commission of an act of</td>
</tr>
<tr>
<td>supplies weaponry to an insurgent, bandit, saboteur or terrorist.</td>
<td>insurgency, banditry, sabotage or terrorism; or</td>
</tr>
</tbody>
</table>
realising that there is a real risk or possibility that the weaponry will be used for this purpose

Penalty
Imprisonment for life or any shorter period.

Competent verdicts on this charge [s 275 read with 4th Schedule]
- Possessing weaponry for insurgency, banditry, sabotage or terrorism;
- Any crime of which a person might be convicted if charged with the crime above.

Possessing weaponry for insurgency, banditry, sabotage or terrorism
[s 27]

This re-enacts s 10 of POSA.

Ingredients [s 27(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has any weaponry in his or her possession or under his or her control</td>
<td>Possesses weapons with the intention that such weaponry will be used in the commission of an act of insurgency, banditry, sabotage or terrorism.</td>
</tr>
</tbody>
</table>

Presumption [s 27(2)]

<table>
<thead>
<tr>
<th>Facts proven by prosecution</th>
<th>Presumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>X was in unlawful possession of any weaponry; and</td>
<td>Unless the contrary is proved, that X possessed the weaponry with the intention that it should be used in the commission of an act of insurgency, banditry, sabotage or terrorism.</td>
</tr>
<tr>
<td>the weaponry consists of any weapon, firearm or ammunition—</td>
<td></td>
</tr>
<tr>
<td>• referred to in s 24 of the Firearms Act; or</td>
<td></td>
</tr>
<tr>
<td>• for the purchase, acquisition or possession of which the accused has no good ostensible reason; or</td>
<td></td>
</tr>
<tr>
<td>• that was part of a cache or was found in the possession of the accused in such a quantity as cannot be accounted for by reason of personal</td>
<td></td>
</tr>
</tbody>
</table>

41
Penalty [s 27(1)]

Imprisonment for life or any shorter period.

Competent verdicts on this charge [s 275 read with 4th Schedule]

- Supplying weaponry to insurgents, bandits, saboteurs or terrorists;
- Possessing dangerous weapons;
- Possessing firearms or ammunition without a certificate in contravention of section 4 of the Firearms Act;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

Possessing dangerous weapon

[s 28]

This re-enacts s 13 of POSA.

Ingredients [s 28(1)]

X commits this crime if X has unlawful possession of—

- artillery of any kind or any shell or other ammunition therefor; or
- a flame thrower; or
- a bomb, grenade or similar missile or device, whether capable of use with a firearm or not, including any fuse, detonator or timing device therefor; or
- a machine-gun or sub-machine-gun; or
- any automatic or semi-automatic firearm, other than a pistol, that is or has been in use in the Defence Forces, the Police Force or the armed or police forces of any neighbouring State.

Penalty [s 28(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 12</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Defence [s 28(2)]

It is a defence for X to prove that—

- X held a certificate or permit issued under any enactment authorising his or her possession of the weapon concerned; or
X possessed the weapon concerned in the course of his or her duties as a member of the Defence Forces or the Police Force, or as an employee of the State duly authorised to possess the weapon.

Charge under Firearms Act [s 28(3)]
X should be charged with contravening s 4 of the Firearms Act if a firearm certificate could have been issued for the firearm or ammunition under the Firearms Act and it is found in the possession of X who did not have the requisite firearms certificate.

Competent verdict [s 275 read with 4th Schedule]
A person charged with possessing a dangerous weapon may be found guilty of contravening s 4 of the Firearms Act if such are the facts proved.

---

Harbouring or concealing insurgent, bandit, saboteur or terrorist [s 29(1)]
This re-enacts s 11 of POSA.

Ingredients [s 29(1)]
X commits this crime if X intentionally harbours or conceals another knowing that this person is an insurgent, bandit, saboteur or terrorist.

Penalty [s 29(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 12</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Competent verdicts on this charge [s 275 read with 4th Schedule]

- Defeating or obstructing the course of justice;
- Assisting the perpetrator of a crime;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

Failing to report insurgent, bandit, saboteur or terrorist [s 29(2) and (3)]
This re-enacts s 11 of POSA.

Ingredients [s 29(2)]
X commits this crime if–

- X becomes aware of the presence in Zimbabwe of another whom X knows to be an insurgent, bandit, saboteur or terrorist; and either
fails as soon as is reasonably practicable after becoming aware of the presence in Zimbabwe of the insurgent, bandit, saboteur or terrorist concerned, and in any event within seventy-two hours of becoming so aware, to report to an official the presence of that other person in Zimbabwe and any information it is in his or her power to give in relation to that other person; or

upon being questioned by an official, intentionally—

- omits or refuses to disclose to the official any information it is in his or her power to give in relation to that other person; or
- gives the official false information in relation to that other person.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Persons granted pardon or amnesty** [s 29(4)]
The obligation to report does not apply to bandits and insurgents who have been granted an amnesty or a pardon.

**Competent verdicts on this charge** [s 275 read with 4th Schedule]

- Defeating or obstructing the course of justice;
- Assisting the perpetrator of a crime;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

**Causing disaffection among Police Force or Defence Forces**

[s 30]

This re-enacts s 12 of POSA.

**Ingredients**

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X induces or attempts to induce any member of the Police Force or Defence Forces to withhold his or her services, loyalty or allegiance or to commit breaches of discipline.</td>
<td>X intends to induce the Police Force or Defence Forces member to withhold his or her services, loyalty or allegiance or to commit breaches of discipline or realising that there is a real risk of so inducing the member.</td>
</tr>
</tbody>
</table>

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Publishing or communicating false statements prejudicial to State

[s 31]

This re-enacts s 15 of POSA.

Ingredients

The prejudicial consequences to the State with which this crime deals are—

- inciting or promoting public disorder or public violence or endangering public safety; or
- adversely affecting the defence or economic interests of Zimbabwe; or
- undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or
- interfering with, disrupting or interrupting any essential service.

There are two subspecies of this crime—

First subspecies [s 31(a)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X, inside or outside Zimbabwe, publishes or communicates to any other person a statement which is wholly or materially false</td>
<td>X intends or realises that there is real possibility of the prejudicial consequences occurring.</td>
</tr>
</tbody>
</table>

This sub-species of this crime is committed whether or not the publication or communication actually results in the prejudicial consequences.

Second subspecies [s 31(b)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X, inside or outside Zimbabwe, publishes or communicates to any other person a wholly or materially false statement And the publication or communication of the statement actually results in the prejudicial consequences.</td>
<td>X knows that the statement is false or does not have reasonable grounds to believe that it is true.</td>
</tr>
</tbody>
</table>

This sub-species of this crime is committed whether or not X intended or realised that there is a real risk of the prejudicial consequences occurring.
**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 20 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts on this charge** [s 275 read with 4th Schedule]

- Incitement to commit murder;
- Criminal defamation;
- Any crime of which a person might be convicted if charged with any of the crimes above.

**Comment**

This is a very nebulous offence and the penalty of up to 20 years imprisonment for it can only be described as savage. A person can commit this offence even though the prejudicial effects do not actually occur or, if they do occur, even if the accused did not intend the harmful effects. The prejudicial consequences to the State with which this crime deals are very wide and vague. This applies particularly to prejudicial consequences such as adversely affecting the defence or economic interests of Zimbabwe or undermining public confidence in a law enforcement agency.

---

**Unlawful possession or wearing of camouflage uniforms**

[s 32]

This re-enacts s 9 of the Miscellaneous Offences Act.

**Ingredients** [s 32(2)]

X commits this crime if he or she unlawfully possesses or wears any camouflage uniform.

**Crime not committed by authorised persons** [s 32(3) read with s 32(1)]

This crime is not committed by authorised persons such as members of the Defence Forces and other uniformed force of the State.

**Penalty** [s 32(2)]

**Unlawful possession of a camouflage uniform**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Unlawful wearing of a camouflage uniform**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 6</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>
Undermining the authority of or insulting President

[s 33]

This re-enacts s 16 of POSA.

Ingredients [s 33(2)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X publicly makes a statement (by words, by an act or by a gesture)</td>
<td>X intentionally makes the statement—</td>
</tr>
<tr>
<td>Publicly making a statement means—</td>
<td>➢ knowing or realising that there is a real risk that the statement is false and</td>
</tr>
<tr>
<td></td>
<td>➢ knowing or realising the real risk that it may—</td>
</tr>
<tr>
<td>• making the statement in a public place or any place to which the public or any section of the public have access;</td>
<td>➢ engender feelings of hostility towards the President or an acting President whether in person or in respect of the President’s office; or</td>
</tr>
<tr>
<td>• publishing it in any printed or electronic medium for reception by the public</td>
<td>➢ cause hatred, contempt or ridicule of the President or an acting President whether in person or in respect of the President’s office.</td>
</tr>
</tbody>
</table>

Penalty [s 33(2)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 6</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>

Comment

This offence may be appropriate to protect the dignity of the office of ceremonial President. But an executive President who is actively involved in political activities should surely not be above criticism. The problem with this offence is that is can, and often is, used to stifle criticism of executive President.

It is arguable that this offence is an undue restriction upon freedom of speech and should either be abolished or its ambit restricted to protecting only the dignity of the office itself against scurrilous attacks.
Leave of Attorney-General

[s 34]

This provides that the leave of the Attorney-General is required before criminal proceedings can be taken for any of these crimes against the State other than proceedings in respect of the crime of possessing a dangerous weapon or unlawfully possessing or wearing a camouflage uniform or for the purposes of remand.
**Crimes Against Public Order**

Sections 36 to 46 incorporate various crimes against the peace and good order of the community which do not, however, have an anti-State character.

*Definitions in respect of crimes against public order [s 35]*

<table>
<thead>
<tr>
<th>Words</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>offensive material</td>
<td>any inflammable, dangerous, noxious, or deleterious substance, material or thing capable of killing or injuring persons, including—</td>
</tr>
<tr>
<td></td>
<td>➢ low or high explosives and the ingredients thereof;</td>
</tr>
<tr>
<td></td>
<td>➢ all types of fuse used in the ignition of explosives;</td>
</tr>
<tr>
<td></td>
<td>➢ detonators;</td>
</tr>
<tr>
<td></td>
<td>➢ timing devices, especially time pencils;</td>
</tr>
<tr>
<td></td>
<td>➢ wire cutters;</td>
</tr>
<tr>
<td></td>
<td>➢ concentrated or other harmful acids;</td>
</tr>
<tr>
<td></td>
<td>➢ ammunition as defined in the Firearms Act;</td>
</tr>
<tr>
<td></td>
<td>➢ biological or chemical warfare agents;</td>
</tr>
<tr>
<td></td>
<td>any other substance, material or thing declared by the Minister, by notice in a statutory instrument, to be an offensive material for the purposes of this definition.</td>
</tr>
<tr>
<td>public demonstration</td>
<td>a procession, gathering or assembly in a public place of persons and additionally, or alternatively, of vehicles, where the gathering is in pursuit of a common purpose of demonstrating support for, or opposition to, any person, matter or thing, whether or not the gathering is spontaneous or is confined to persons who are members of a particular organisation, association or other body or to persons who have been invited to attend</td>
</tr>
<tr>
<td>public gathering</td>
<td>public meeting or a public demonstration</td>
</tr>
<tr>
<td>public meeting</td>
<td>any meeting which is held in a public place or to which the public or any section of the public have access, whether on payment or otherwise</td>
</tr>
<tr>
<td>public place</td>
<td>any thoroughfare, building, open space or other place of any description to which the public or any section of the public have access, whether on payment or otherwise and whether or not the right of admission thereto is reserved</td>
</tr>
<tr>
<td>weaponry</td>
<td>any of the following kinds of offensive material—</td>
</tr>
<tr>
<td></td>
<td>➢ artillery of all kinds;</td>
</tr>
<tr>
<td></td>
<td>➢ a firearm or other apparatus for the discharge of bullets or other</td>
</tr>
</tbody>
</table>
kinds of projectiles which are designed to be lethal, whether solid, explosive or gas diffusing;

- a flame-thrower;

- high or low explosive, whether or not manufactured as a bomb, grenade or similar missile or device and whether capable of use with a firearm or not, including a fuse, detonator or timing device therefor;

- biological or chemical warfare agents;

- any other offensive material declared by the Minister, by notice in a statutory instrument, to be an offensive material for the purposes of this definition.
Public violence

[s 36]

This codifies the common law crime of public violence.

Ingredients [s 36(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X acts in concert with one or more others, and forcibly and to a serious extent—</td>
<td>X intends such disturbance or invasion or realises that there is a real risk or possibility that such disturbance or invasion may occur.</td>
</tr>
<tr>
<td>➢ disturbs the peace, security or order of the public or any section of the public; or</td>
<td></td>
</tr>
<tr>
<td>➢ invades the rights of other people;</td>
<td></td>
</tr>
</tbody>
</table>

Factors to be taken into account to decide whether disturbance of peace, security or order or invasion of rights is sufficiently serious to constitute this crime [s 36 (2)]

A court must take into account all relevant factors, including —

➢ the nature and duration of the disturbance or invasion;
➢ the motive of the persons involved in the disturbance or invasion;
➢ whether the disturbance or invasion occurred in a public place or on private property;
➢ whether or not the persons involved in the disturbance or invasion were armed and, if so, the nature of their weapons;
➢ whether or not bodily injury or damage to property occurred in the course of or as a result of the disturbance or invasion;
➢ whether or not there was an attack on the police or on other persons in lawful authority;
➢ the manner in which the disturbance or invasion came to an end.

Aggravating circumstances [s 36(3)]

It is an aggravating circumstance if, in the course of or as a result of the public violence—

➢ there was an attack on the police or on other persons in lawful authority; or
➢ bodily injury or damage to property occurred; or
➢ the person who has been convicted of the crime instigated an attack on the police or other persons in lawful authority or instigated the infliction of bodily injury or the causing of damage to property.

Penalty [s 36(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 12</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Competent verdicts on charge of public violence [s 275 read with 4th Schedule]
- Attempted murder;
- Robbery;
- Malicious damage to property;
- Disorderly conduct in public place;
- Disrupting a public gathering;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

### Participating in gathering with intent to promote public violence, breach of the peace or bigotry

[s 37]

This re-enacts, with modifications, s 19 of POSA.

**Ingredients** [s 37(1)]

The three species of this crime are as follows—

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X acting together with one or more others present with X in any place or at any meeting</td>
<td>X intends or realises that there is a real risk of forcibly—</td>
</tr>
<tr>
<td></td>
<td>➢ disturbing the peace, security or order of the public or any section of the public; or</td>
</tr>
<tr>
<td></td>
<td>➢ invading the rights of other people.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X acting together with one or more others present with X in any place or at any meeting performs any action, utters any words or distributes or displays any writing, sign or other visible representation that is obscene, threatening, abusive or insulting.</td>
<td>X intends by this action to provoke a breach of the peace or realises that there is a risk or possibility that a breach of the peace may be provoked.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X acting together with one or more others present with X in any place or at any meeting utters any words or distributes or displays any writing, sign or other visible representation—</td>
<td>X intends to engender, promote or expose to hatred, contempt or ridicule any group, section or class of persons in Zimbabwe solely on account of the race, tribe, nationality, place of origin, national or ethnic origin, colour, religion or gender of such group, section or class of persons; or</td>
</tr>
</tbody>
</table>
realises that there is a risk or possibility that such behaviour might have such an effect.

Immaterial whether action planned or spontaneous [s 37(2)]
This crime is committed whether the action is spontaneous or planned in advance.

Immaterial whether private or public place [s 37(2)]
This crime is committed whether the place or meeting where action occurred is public or private.

**Penalty** [s 37(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Person acting alone in public place [s 37(3)]
If X would have committed this crime but for the fact that X acted alone in a public place, the competent charge against X will be either—
- disorderly conduct in a public place; or
- causing offence to persons of a particular race, tribe, place of origin, colour, creed or religion.

**Obstructing or endangering free movement of persons or traffic**

[s 38]
This re-enacts s 18 of POSA

**Ingredients**
The three species of this crime are as follows—

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X throws or propels or prepares to throw or propel any missile, article or thing at any person, motor vehicle, boat, aircraft or building.</td>
<td>X intends to cause damage or injury or realises that there is a real risk of causing this.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X, overturns or attempts to overturn any motor vehicle, boat or aircraft without lawful excuse, the proof of which lies on him or her.</td>
<td></td>
</tr>
</tbody>
</table>
### Physical aspects

- X leaves or places on or over any road any thing otherwise than in accordance with any other enactment,

### Mental aspect

- X intends to obstruct the road or endanger persons using it or realises that there is a real risk that X will do so.

### Penalty

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 12</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

#### Dealing in or possessing prohibited knives

[§ 39]

This re-enacts § 8 of the Miscellaneous Offences Act.

**Ingredients** [§ 39(3) read with 39(1) and (2)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X has in his or her possession a prohibited knife</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X deals in a prohibited knife. To deal in means</td>
<td></td>
</tr>
<tr>
<td>- to sell, hire or offer for sale;</td>
<td></td>
</tr>
<tr>
<td>- to advertise for sale or hire;</td>
<td></td>
</tr>
<tr>
<td>- to lend or give another a prohibited knife.</td>
<td></td>
</tr>
</tbody>
</table>
For the purposes of this crime a prohibited knife means—

- a knife with a blade—
  - that opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a “flick knife”; or
  - that is released from the handle or sheath of the knife by the force of gravity or the application of centrifugal force and which, when released, is locked in place by means of a button, spring, lever or other device, sometimes known as a “gravity knife”; or
- a knife that is—
  - released from the handle or sheath of the knife manually; and
  - locked in the open position by means of a button, spring, lever or other device; and
  - released from the locked open position otherwise than solely by manual pressure on the blade.

- A knife that is declared by the Minister to be a prohibited knife. (Where the Minister considers it necessary in the public interest to do so, her or she may, by notice in a statutory instrument, declare any knife or class of knife to be a prohibited knife for the purposes of this section.)

But it does not include a trimming knife the blade of which does not exceed thirty millimetres in length.

**Penalty** [s 39(3)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 6</td>
<td>Up to one year</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Forfeiture of knife** [s 39(4)]

The court convicting X may order the forfeiture to the State of the knife that formed the subject of the charge.

---

**Possession of articles for criminal use**

[s 40]

This re-enacts s 6(1)(a) of the Miscellaneous Offences Act.

**Ingredients** [s 40(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X, without lawful excuse which X must</td>
<td>X knowingly has custody or possession of the</td>
</tr>
</tbody>
</table>
prove, has in his or her custody or possession an article for use in unlawful entry into premises, theft, fraud or a contravention of s 57 of the Road Traffic Act.

**Presumption [s 40(2)(b)]**

<table>
<thead>
<tr>
<th>Facts proven</th>
<th>Presumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>X had in his or her custody or possession an article made or adapted for use in unlawful entry into premises, theft, fraud or a contravention of s 57 of the Road Traffic Act.</td>
<td>It will be presumed unless the contrary is proved that the person had it in his or her possession for such use.</td>
</tr>
</tbody>
</table>

**Penalty [s 40(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>

---

**Disorderly conduct in public place**

[s 41]

This re-enacts and combines s 36 of the repealed Law and Order (Maintenance) Act and s 7 of the Miscellaneous Offences Act.

**Ingredients**

X commits this crime if X, in a public place—

- intentionally engages in disorderly or riotous conduct; or
- uses threatening, abusive or insulting words or behaves in a threatening, abusive or insulting manner, intending to provoke a breach of the peace or realising that there is a real risk or possibility of doing so.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>
Causing offence to persons of particular race, tribe, place of origin, colour, creed or religion

[s 42]

This re-enacts s 44 (1) (e) of the repealed Law and Order (Maintenance) Act, while at the same time updating that crime by reference to the grounds of unlawful discrimination mentioned in s 23 of the Constitution.

It does not, however, make it a criminal offence to utter abuse about persons of a particular description by “political opinion”. The reason why this is not made an offence is that to criminalise this may hinder ordinary political discourse and therefore constitute a breach of the right of free expression.

Ingredients [s 42(2)]

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>creed or religion</td>
<td>Any system of beliefs associated with practices of worship that is adhered to by any significant body of persons in Zimbabwe or any other country</td>
</tr>
<tr>
<td>film, picture, publication, record, statue</td>
<td>These have the meanings assigned to those terms by section 2 of the Censorship and Entertainments Control Act</td>
</tr>
<tr>
<td>“publicly”, in relation to making a statement</td>
<td>Making the statement in a public place or any place to which the public or any section of the public have access; publishing it in any printed or electronic medium for reception by the public</td>
</tr>
<tr>
<td>statement</td>
<td>Includes any act, gesture or form of expression, whether verbal, written or visual, but does not include any film, picture, publication, statue or record that is of a bona fide literary or artistic character</td>
</tr>
</tbody>
</table>

Physical ingredients                                                                                      Mental ingredient
X publicly makes any insulting or otherwise grossly provocative statement that causes offence to persons of a particular race, tribe, place of origin, colour, creed or religion. X intends to cause such offence or realises there is a real risk or possibility of doing so.

Penalty [s 42(2)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
</table>
Possessing an offensive weapon at a public gathering

[s 43]

This re-enacts s 30 of POSA.

Ingredients [s 43(2)]

X commits this crime if, while present at a public gathering X has with him or her any offensive weapon except when X has the weapon in pursuance of lawful authority.

The term “offensive weapon” means–

- any weaponry or offensive material; or
- any object made or adapted to be used for causing injury to the person; or
- any stone.

A person will be deemed to be acting in pursuance of lawful authority only if the person is acting in his or her capacity as a police officer, a member of the Defence Forces or an employee of the State or a local authority.[s 43(3)]

Penalty [s 43(2)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Disrupting public gathering

[s 44]

This re-enacts s 31 of POSA.

Ingredients

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>At a public gathering X</td>
<td>X intends to prevent the transaction of the business for which the gathering was called together, or realises that there is a real risk or possibility of this.</td>
</tr>
<tr>
<td>- engages in disorderly or riotous conduct, or</td>
<td></td>
</tr>
<tr>
<td>- uses threatening or insulting words, or</td>
<td></td>
</tr>
<tr>
<td>- behaves in threatening, abusive or insulting manner</td>
<td></td>
</tr>
</tbody>
</table>
**Intimidation**

[s 45]

This re-enacts s 22 of POSA.

**Ingredients**

X commits this crime if—

- X intentionally uses an express or implied threat to inflict harm unlawfully;
- to compel or induce another—
  - to do something which that person is not legally obliged to do; or
  - to refrain from doing something which that person is legally entitled to do.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Criminal nuisance**

[s 46]

This creates the new crime of “criminal nuisance”, which covers the numerous acts of public nuisance presently made criminally liable under s 3(2)(a) to (w) of the Miscellaneous Offences Act. These acts are specified in the Third Schedule to the Code. The inclusion in the Code of this and other crimes from the Miscellaneous Offences Act means that the Act can be repealed in its entirety.

**Ingredients**

X is guilty of this crime if X does any of the acts specified in the Third Schedule.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>
Crimes Against the Person

Homicide

Sections 47 to 58 deal with crimes involving the death of persons.

Murder

[s 47]

Ingredients [s 47(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X unlawfully causes the death of Y</td>
<td>X intended to kill Y;</td>
</tr>
<tr>
<td></td>
<td>or</td>
</tr>
<tr>
<td></td>
<td>X continued to engage in conduct after realising that there is a real risk that the conduct may cause death.</td>
</tr>
</tbody>
</table>

Where X intends to cause death, X is guilty on the basis of actual intention.

Where X does not have actual intention to cause death, but X realises that there is a real risk that death would result, X is guilty on the basis of what used to be referred to as legal intention.

Borderline between murder and culpable homicide

It is often difficult to decide whether X is guilty of murder on the basis of legal intention or is only guilty of culpable homicide. If the court finds that X did realise that there was a risk of death arising out of his or her actions and X nonetheless persisted with the action X is guilty of murder. But if the court finds that X did not subjectively realise the risk of death but a reasonable person would have realised and guarded against this risk X is only guilty of culpable homicide. If X admits that he or she did appreciate the risk of death, there is no problem in determining that he or she is guilty of murder on the basis of legal intention. But the determination of the issue of legal intention is more difficult where X denies that he or she realised there was a risk of death arising out of what he or she was doing. Here the court has to apply inferential reasoning and the court will have to decide whether despite X’s denial only reasonable inference is that must have and therefore did realise that there was a risk of death. If the court decides that he did realise the risk of death, it is saying that X is lying when he or she claims he or she did not realise this risk.

In deciding this issue, the court must take cognisance of all subjective features that may have affected the mental capacity or ability of X to realise that there was a risk of death arising from his or her activity. The factors that may have affected the state of mind of X include provocation, intoxication, mental disorder or disability and youthfulness. The crucial question is whether the
presence of one or more of these factors prevented X from realising that there was a risk of his action causing the death. For example, if X has been severely provoked and has completely lost his or her self-control, X may not have realised that death would result from his or her conduct. If X has consumed alcohol or drugs and this has impaired his or her mental faculties, X may not have appreciated that death would result from his or her actions. In both these situations the court will not convict X of murder if it finds that X lacked the legal intention to kill but X may still be guilty of culpable homicide.

A good case illustration of how application of the subjective test X is not guilty of murder because of absence of legal intention, even though it would have been palpably obvious to any reasonable person in the same situation that death would result from X’s actions is the case of S v P 1972 (2) SA 412 (A). In this case a youth who had run away from an institution where he was being held had been re-captured and was being transported back to the institution in a train. When he was escorted to the toilet by a guard, he had wrapped a metal chain around the guard’s neck and pulled the chain upwards until the guard was no longer resisting. The guard died. The trial court has convicted the youth of murder but on appeal the court decided he was only guilty of culpable homicide. The subjective factors that led the court to decide that he may have lacked legal intention were the age of X, the fact that he had a disturbed personality and had a tendency to use violence in an uncontrolled manner and that the institution in which he was being held the boys played a game in which one boy would render another unconscious by twisting a towel around his throat. The youth said that when he had applied the chain to the guard’s neck he was only trying to render him unconscious.

Similarly in the Zimbabwean case of S v Richards 2001 (1) ZLR 129 (S) a youth was found not guilty of murder when he had shot at a bird near an inhabited farm compound and the bullet had ricocheted and killed a child hiding in a drum. When the youth had shot at the bird no person was visible to him. The court found him guilty only of culpable homicide as it found he did not realise that he end up killing a person, although any reasonable person would have appreciated that there was a risk of death to a person.

Thus where there are such subjective features, the court will take these into account when deciding whether X had legal intention. More difficult are cases where no special subjective features are present.

Take a situation where X is a sane adult and not drunk and was not provoked and there are no other special subjective features etc. If X says he did not realise risk of death, but the risk would have been obvious to a normal person it is likely that court will say that any normal person would have appreciated the risk, you are a normal person and you must have appreciated the risk. But this is tantamount to applying the objective test which is not the correct test for murder. For example, X shoots close to D to frighten him but aim poor and bullet hits and kills D. If court believes X that shooting to miss and he didn’t think he might miss, the court should acquit him or murder but it is far more likely to say that in shooting so close to D must have appreciated that might hit and kill him. Thus in the case of S v Henderson S-17-84 although X maintained that he had shot to miss the complainant, he was still found guilty of attempted murder when the bullet hit and injured the complainant.
There are a number of borderline cases where bullets fired by armed robbers have been found guilty of murder where they have ended up killing their fellow criminals in the process of trying to kill their victims. See for example in the cases of *S v Mpala* 1986 (2) ZLR 93 (S) and *S v Nkombani* 1963 (4) SA 877 (A). There is even one South African case, *S v Nhlapo* 1981 (2) SA 744 (A), in which robbers were convicted of murder where the robbers had fired on security guards and a security guard had been killed probably by mistake by a fellow security guard who was returning fire aimed at the robbers. The court found that the robbers must have known that during the robbery there could be a gun battle in which anyone in the vicinity could be killed including a guard, a robber and a bystander.

**Inciting or assisting a mother to kill her own child**

The person inciting or assisting a mother to kill her own child can be found guilty of murder even when the mother herself is only guilty of infanticide. See below under the topic of infanticide.

**Penalty** [*s 47(2)*]

Death, unless—

- X was under 18 at the time he or she committed the crime; or
- the court decides that there were extenuating circumstances.

**Competent verdicts on charge of murder** [*s 275 read with 4th Schedule*]

- Infanticide;
- Culpable homicide;
- Any crime of which a person might be convicted if charged with any of the crimes above.


---

**Infanticide**

[*s 48*]

**Background**

The offence of infanticide was first introduced into Zimbabwean law by the Infanticide Act. That Act created a special offence of infanticide, enabling cases of baby killing by mothers to be charged, not as murder, but as infanticide. This section substantially incorporates the provisions of the Infanticide Act.

See 1992 Vol 4 No 4 *Legal Forum* p 22 for a critical examination of the original Infanticide Act by C Broe.
Directions

This crime can only be committed by a mother who causes the death of her own child within 6 months of giving birth to the child.

The elements of the offence are:
- X must be a woman;
- the victim must have been X’s own child;
- X must have killed the child within 6 months of giving birth to the child;
- the killing must have been either intentional or carried out by means which the accused realised involved a real risk to the child’s life;
- at the time of the killing the balance of X’s mind must have been disturbed as a result of giving birth to the child.

Thus what makes this crime different from murder is that, although the woman killed her child intentionally, she was in a disturbed state of mind at the time she intentionally killed her child as a result of pressure and stress arising out of the birth.

In determining whether X’s balance of mind has been disturbed as a result of giving birth to the child the court can take into account not only the stress caused by the actual birth process but also the pressure and stress she suffered arising out of the following social, economic and psychological factors:
- the effects which the birth had, or which she believed it would have, on her social, financial or marital situation;
- the difficulties the woman would have, or she believed she would have, in caring for the child in her social, financial or marital situation or due to her inexperience or inability;
- any other relevant considerations, whether based on the psychological effects on the woman’s mind arising out of the birth itself or otherwise.

Mother can be charged with murder [s 48(4)(a)]

The crime of infanticide only applies if the balance of the mother’s mind had been disturbed as a result of giving birth to the child. Where the mother’s mind was not disturbed, she should be charged with murder if she intentionally kills her own child. For instance, if the mother had the means to support the child, but did not want to be inconvenienced by having to look after the child, the charge of murder should be brought.

Special verdict [s 48(4)(b)]

The offence of infanticide does not stop the court from returning, where appropriate, a special verdict of not guilty by reason of insanity. This verdict should be returned where, for instance, the woman was so mentally disturbed when she killed her child that she did not understand the nature of what she was doing.

Inciting or assisting mother to kill her own child
There has been a controversy as to whether a person who incites or assists a woman to kill her own child should be charged as an accomplice to infanticide or should be charged with murder. The person inciting or assisting may be her lover who has impregnated her or a relative, friend or employer.

There are various reasons why the inciter or assister should be charged with murder rather than as an accomplice to infanticide.

The offence of infanticide was created in order to allow mothers who kill their children in disturbed states of mind due to birth to be found guilty of a lesser offence than murder. This recognised the fact that the blameworthiness of the mother is far less than a murderer because the mother has killed in a disturbed state of mind brought about by the stress arising out of the giving of birth.

Only the mother of the child can commit infanticide and the mother is guilty only of infanticide and not murder if the mother was in a disturbed state of mind when she killed her own child. The person who incites or assists a mother who is in a disturbed state of mind to kill her child is not suffering from any disturbed state of mind. Take the situation where the boyfriend encourages his girlfriend to kill her newly born child because he does not want to have to support the child. The boyfriend is not in the predicament of the mother and is not under her stress. His motive in inciting her to kill was entirely selfish and his actions are very blameworthy. He is using his girlfriend whom he knows to be in an agitated mental state to kill her baby. To find him guilty as an accomplice to infanticide will mean that the maximum sentence that could be imposed upon him would be 5 years in prison, which would be completely inadequate.

This situation is similar to a situation where a person incites a mentally disturbed person to commit suicide. On the other hand, it is different from a case where a woman assists a man to rape a woman. The woman is guilty of rape as an accomplice although she cannot commit this crime as the actual perpetrator as only a man can commit rape. In this situation, the blameworthiness of the woman is great as she facilitated the rape by the man. Neither party is suffering from any mental disturbance.

Where the person inciting or assisting a young mother to kill her own child is an older relative or a person who has influence or authority over the mother, again the moral blameworthiness is very high if that person uses his or her influence or authority to persuade the mother to kill her own child.

Cases

In *S v Kachipare* 1998 (2) ZLR 271 (S) K, the employer of a 17-year-old domestic worker, persuaded the girl to kill her own child, telling her that she did not have the means to look after a baby and if she took the baby to the Kachipare household she would be chased away. K related how she herself had killed her own baby when she was at school and how a former housemaid of hers had also killed her baby. K was convicted of murder whereas the girl was convicted of infanticide. As no extenuating circumstances were found to exist, K was sentenced to death. The sentence imposed on girl for infanticide was 2 years wholly suspended. The *Kachipare* case has been criticised but it seems to be correctly decided.
In *S v Kuyeri* S-188-95 X, aged 45, who was a relative of a 16-year-old girl, impregnated the girl. After the baby was born the girl suggested to X that the baby should be killed. X strangled the baby and buried it. The girl was found guilty of infanticide and sentenced to three years’ imprisonment. X was found guilty of murder, and finding that there were no extenuating circumstances, the trial court sentenced him to death. On appeal the court said that although this was a borderline case, there was no basis for interfering with the finding by the trial court that there were no extenuating circumstances in respect of X. The appeal court agreed with the trial court that the disparity in sentences imposed on the girl and X could not be taken into account. The fact that a far less severe sentence was imposed on the girl in no way affected whether there were extenuating circumstances in relation to X. His moral blameworthiness was not reduced by the lesser sentence imposed on the girl.

*Penalty [s 48(1)]*

Imprisonment for up to 5 years.


*Competent verdicts [s 275 read with 4th Schedule]*

- Culpable homicide;
- Unlawful termination of pregnancy;
- Any crime of which a person might be convicted if charged with any of the crimes above.

*Case*

In *S v Rwodzi* 2001 (2) ZLR 127 (H) X pleaded guilty to infanticide and was sentenced to a partly suspended term of imprisonment. She admitted having given birth to a live baby, whom she took a few days after the birth, clothed and wrapped in a cloth, and put in a shallow pit not far from a road. When the police took her to the scene there was no sign of the baby, although the cloth was still there. There was thus no evidence that the child had died or of the cause of death. She admitted that she wanted to do away with the child and that through her actions the child would eventually die of exposure. The court held that X had undoubtedly abandoned her child, but the section under which she was charged spoke of unlawfully and intentionally causing the death of a child. The essential elements are the same as murder. There was, though, no evidence that the child had died, so she should have been convicted only of attempted infanticide.

---

**Culpable homicide**

*[s 49]*

This crime is aimed at trying to protect people against persons who act carelessly and cause other people’s deaths.

The Code provisions expand the ambit of this crime to cover a situation where X realises that there is a risk of death but does not take a conscious risk by continuing to act recklessly but instead simply fails to guard against the risk of death.

*Ingredients*
X can commit this crime if he or she causes the death of a person either—

- negligently failing to realise that death may result from his or her conduct; or
- realising that death may result from his or her conduct and negligently fails to guard against the possibility of death occurring.

**Comment**

Previously in our law culpable homicide was only committed when X negligently failed to foresee and guard against death. The Code has added a further type of culpable homicide which may be referred to as advertent or conscious negligence. Advertent negligence applies where X appreciates that there is risk of death, but rather than taking a conscious risk which would mean that he or she would have intention to kill, X negligently fails to guard against the risk.

It remains to be seen how often the second species of culpable homicide will apply. It is submitted that there will be considerable difficulty in deciding whether—

- X should be found guilty of murder on the basis that X realised that there was a real risk that his or her conduct might result in death and X continued with his or her conduct taking a conscious risk.

or

- X should be found guilty only of culpable homicide because although X realised that there was a risk that death would result from his or her conduct, X did not take a conscious risk but instead was negligent in failing to guard against the risk.

The distinction between conscious and inadvertent negligence will be inordinately difficult to maintain, but clearly where the State believes that X took a conscious risk of causing death, X should be charged with murder rather than culpable homicide.

In the case of *S v Majarira* 2003 (1) ZLR 606 (H) the court stated that the concept of negligence in culpable homicide cases has two components: (1) the issue of whether death was reasonably foreseeable in the circumstances; and (2) the issue of what steps a reasonable person would have taken to prevent death from occurring. Thus negligence consists of a failure to take the steps that a reasonable person would have taken to guard against death where death was reasonably foreseeable. In this case a woman was looking after a two year old child. The child had died as a result of falling into a tin of hot water that was in the house of the woman. The court found that the magistrate’s failure to investigate properly the facts and full circumstances of the case made it unsafe to uphold the conviction for culpable homicide.

**Situations leading to charges of culpable homicide**

There myriad situations in which negligent causing of death can arise. Some of the most common are the following:

- Negligent driving leading to fatal accidents;
- Negligent accidents in industries and mines causing death;
- Negligent failure to prevent deaths from dangerous conditions on land and premises;
- Negligent use of firearms;
Assaults leading to death where the perpetrators did not have actual or legal intention to cause death but where death was reasonably foreseeable.

**Motor accidents**

In *S v Mudoti* 1986 (4) SA 278 (ZS) and *S v Mugwagwa* S-24-88 the court dealt with whether the doctrine of *res ipsa loquitur* applies to criminal cases. The case of *S v Njara* S-95-84 deals with what happens where there is joint and simultaneous negligence.

In *S v Kurwakumire* S-23-89 the court decided that contributory negligence has no application in criminal law.

In *S v Manhondo* HH-186-01 the court pointed out that where a person is pleads guilty to culpable homicide arising out of a motor accident, it is necessary for the facts to be fully canvassed, so that the degree of negligence can be clearly established and an appropriate sentence imposed.

In *S v Bray* 1966 RLR 255 (A) X had knocked down and killed a road worker. He was found guilty of culpable homicide.

In *S v Ezekiel* A-100-69 a bus driver took a corner too fast and wandered onto the wrong side of road. He was found guilty.

In *S v Papenfus* GS-116-70 X knocked down a motorcyclist. He had failed to see the motorcyclist because of the sun and because his vision had been obstructed by another car. He was found guilty.

In *S v Tanengwa* A-167-70 X had driven at a speed which meant that it was impossible for him to stop if the front vehicle braking suddenly. X braked to avoid hitting the front vehicle which had braked suddenly and he had veered onto the wrong side of the road and hit the oncoming car. X was found guilty.

In *S v Zabron & Anor* 1971 (3) SA 918 (RA) a bus driver had attempted to cross a causeway over a river in flood. He had not checked properly first. The bus had capsized and some passengers had drowned. X was found guilty.

In *S v Tshuma* A-17-74 X had veered onto the wrong side of the road and had collided with a heavy vehicle and a passenger had died. X was found guilty.

In *S v Mbobola* A-72-74 X went through a red robot and caused a fatal accident. X was found guilty.

In *S v Schoeman* 1974 (2) RLR 52 (A) a drunk driver’s vehicle had left the road and had hit a cyclist. He was found guilty.

In *S v Gillespie* A-188-74 X had turned right in front of an oncoming motor cyclist. He was found guilty.

In *S v Gilbert* A-204-74 X had gone through a red robot and caused a fatal accident. He was found guilty.

In *S v Godwin* A-44-75 an elderly driver had failed to keep a proper lookout and had caused a fatal accident. He was found guilty.

In *S v Carnegie* 1975 (1) RLR 171 (A) X had overtaken at an intersection. The vehicle being overtaken had tried to turn left without prior warning and there had been a fatal collision. X was found not guilty.

In *S v Mazviwa* A-301-77 X had knocked down a cyclist after failing to keep a proper lookout. He was found guilty.

In *S v Rorewe* A-49-78 X was responsible for a head-on fatal collision. He was found guilty.

In *S v Tarmacadam Services* A-64-78 a heavy vehicle with a bulldozer on top had parked at night in such a way that the bulldozer blade was protruding over the road. This created a hazard leading to a fatal accident. X was found guilty.
In *S v Claasen* 1979 RLR 323 (A) X allowed an unlicenced driver to drive his vehicle and failed to supervise that driver. An accident ensued resulting in death. X was found guilty.

In *S v Noah* A-4-80 a drunken driver had caused a fatal accident. He was found guilty.

In *S v Brannigan* 1985 (1) ZLR 239 (S) X was found not guilty of negligently causing the death of a motorcyclist. He had entered an intersection believing that there was no oncoming traffic. He collided the evidence had not established that there was negligence.

In *S v Tshuma* A-26-79 a drunken driver had caused a fatal accident. He was found guilty.

In *S v Noah* A-4-80 a bus driver had caused a fatal accident. He was found guilty.

In *S v Zvimire & Anor* HH-336-83 a driver of a bus started to move off after the inspector signalled that it was safe to so. He had looked in his rear view mirrors. A passenger who was embarking was killed. X was found not guilty as a reasonable bus driver would have relied on the signal of the senior person and would not have double checked.

In *S v Jira* S-108-83 after the bus had stopped a passenger who was disembarking was involved with an inspector about the transport costs for his bicycle. The inspector told the passenger to come and collect his bike at the police station. He pushed the passenger away and signalled to the driver to move away. The passenger grabbed at the door but could not get a grip so instead clutched at the fuel inlet pipe. He clung to the bus as it picked up speed. He lost his grip and fell under the bus and died. The court held that the moving off of the bus was the factual cause of the death but it was not the proximate cause because it was not reasonably foreseeable that the passenger would commit such a highly dangerous act.

The case of *S v Chikandiwa & Ors* HH-302-86 deals with the duty of the driver of a bus to ensure that passengers are safely on the bus before it starts off and whether this duty can be delegated.
In *S v Kurwakumire* S-23-89 a bus conductor, signalled to the driver of the bus to proceed whilst passengers were still trying to board. The bus started off with some passengers running alongside trying to get on; one of them fell and was run over and killed by the rear wheels of the bus. The bus conductor was found guilty. He owed a duty of care not only to the passengers already on his bus but also to those attempting to board it, and he exhibited culpable indifference by not going to the door to ascertain that the passengers were safely aboard before signalling to the driver to start. He should have foreseen that something untoward and unexpected but within the range of human experience might happen if he did not do so. Although deceased’s death might to some extent have been due to his own negligence, it did not exonerate him from the duty cast upon him by the law; contributory negligence has no application in criminal law.

In *S v Musariri* HH-473-88 after X had parked his motor-car in a street in a high-density suburb, the deceased crawled underneath it unnoticed. X drove off without checking underneath the vehicle and killed D. The court decided he was not guilty as that his failure to check underneath his vehicle had not been shown to be negligent. Very few, if any, ordinary people do so before getting into their vehicles and driving away, though it might be a wise precaution to do so if the vehicle has been parked in close proximity to a heavy congregation of young children.

In *S v Dudzai* S-3-91 a car was parked off the left side of the road, at night, with a tractor parked next to it with its lights on to illuminate the car. X saw the lights from some distance away on the straight road and mistook it to be oncoming traffic. He flashed his lights, slowed down and unintentionally putting himself on a collision course with the parked vehicles. At the last minute he realised his mistake and tried to swing right but could not avoid a glancing blow and killed someone standing beside a car in front of the tractor. The court held that he was negligent. A driver must continually reassess such a situation and slow down enough to give himself time to react. X should have slowed down even more to give himself a chance to establish what the light was and take evasive action.

In *S v Kwangwari* HH-244-88 X, acting in accordance with his employer’s instructions, was driving a flat-bed lorry and trailer loaded with fencing poles which workers were distributing to other workers on the ground whilst the lorry was moving slowly. D was standing on the lorry unloading a pole when he lost balance and fell under the trailer’s wheels and was killed. The court held that driving slowly while passengers are not seated does not per se amount to negligent driving. It was certainly not so in this case in view of the nature of the work X was doing on the instructions of his employer.

In *S v Mandwe* S-142-93 the court decided that a motorist should anticipate the folly of others. He must exercise special care in any area designated as a danger zone by speed humps. X was aware of a footpath crossing the road and speed humps designating a danger zone. Speed humps oblige a motorist to proceed with caution. He reduced speed but insufficiently, and drove with his head partially averted to oncoming headlights. He failed to see a cyclist without a light crossing from the right and appearing from behind the oncoming vehicle, until it was too late to avoid him. He was found guilty.

In *S v Beets* S-90-93 – A motorist in a heavily populated area saw children walking on the edge of the main road, with their backs to him. It was not enough to slow down to 60 and move to the middle of the road. He should have slowed down considerably, and also hooted, had his foot ready to brake and watched the children carefully for the first sign of danger. He should have anticipated that a child may dash onto the road and taken appropriate action to avoid any accident. He was found guilty.

In *S v Gardini* HB-66-94 X’s vehicle struck a child. X found guilty.

In *S v Dudzai* S-571-91 X was confused by the strong light of a tractor parked on the left side of the road and thought it was an oncoming vehicle. He flicked his own lights a couple of times, slowed down from 80 kph to 60, and pulled off to the left. At the last minute he realised his mistake and tried to swing right but could not avoid a glancing blow and killed someone standing beside a car in front of the tractor. A driver’s duty in such a situation is not merely to slow down
and move left; this may not be enough. A driver facing an uncertain situation must undertake a continuous re-assessment of the situation, and X should have slowed down even more to give himself a chance to establish what the light was and take evasive action.

In *S v Castedo* S-77-94 X’s vehicle struck a pedestrian. He did not slow down until it was too late. He was guilty.

In *S v McLean* 2000 (2) ZLR 239 (S) X had hit a person who had disembarked from a stationary vehicle but who had walked round to the front of the bus and tried to cross the road without checking whether it was safe to do so. X’s conviction for culpable homicide was set aside on the basis that the reasonably cautious driver was not, without more, expect that with each and every stationary vehicle a pedestrian might emerge from the front of the vehicle without checking to see if there was oncoming traffic.

*Children running out onto the road*

In *S v Duri* S-141-89 the court held that a motorist has a duty to reduce his speed and exercise caution whenever he observes animals or people, especially children, within the vicinity of the road ahead. Children have a propensity for impulsive and sometimes irrational action, and therefore greater care is demanded towards them than is otherwise necessary. X struck and killed with his motor vehicle a child who had run into the road unexpectedly to chase a goat he was herding. He was found guilty.

In *S v Ferreira* S-13-92 X knocked down and killed a seven-year-old boy who had dashed out in front of vehicle from the side of the road where he had been standing together with three other children and two male adults. The court held that a motorist must exercise special care and vigilance when he knows that there are young children in the vicinity of the road because young children are known to have a propensity for impulsive and sometimes irrational action. Thus greater care is demanded of the motorist towards children than is necessary for the safety of adults. The motorist is not, however, obliged to take precautions against every possible manoeuvre that the child could imaginably perform, but only conduct falling within common experience. The fact that the child was in the company of two adults did not entitle X to assume that the adults would exercise sufficient control over the children to protect them from danger. At very least it must be patent that the adults are in fact exercising effective control over the child by, for instance, holding the child’s hand before such an assumption can be made. X had been negligent in that, having seen the children, he had continued to drive at a speed, which in the circumstances was excessive, and by not significantly slowing down, he had prevented himself from taking effective evasive measures. The running out of the child was reasonably foreseeable and was not a *novus actus interveniens*.

In *S v Bussman* S-2-96 X saw several boys on each side of a tarred country road. She hooted 3 times to alert them of her approach and slowed down considerably to a speed that would enable her to stop in a few metres. One of the boys dashed across the road and joined his friends and then, without warning or apparent reason, dashed back across the road when X was only a few metres away. X braked and swerved but could not avoid hitting the boy. He was struck and killed by the edge of her car. As X had taken all reasonable precautions, the conviction for culpable homicide was not justified.

In *S v Nortje* 2003 (1) ZLR 255 (H) the court decided that the standard of care required of a driver who sees children ahead of him is much higher than that ordinarily required of a driver approaching adult pedestrians. Once a motorist becomes aware of the presence of a child on or near the road ahead of him, it is incumbent upon him to prepare for any eventuality, given that children are prone to sudden and unpredictable behaviour. The motorist then has a duty to ensure that he has anticipated that kind of behaviour and must be prepared if need be to stop.
Sudden emergency
In *S v Ruredzo* 1982 (2) ZLR 181 (S) the court found that X was not guilty of culpable homicide after he had knocked down and caused the death of a pedestrian that suddenly and unexpectedly stepped out into his path. X had driven at a proper speed and had been in a proper position on the road. It is not reasonably foreseeable that a pedestrian whose actions give every appearance of a person who has seen the oncoming traffic and is waiting for it to pass, will suddenly step forward into the path of oncoming traffic.
See also *S v Fazakerly* S-141-83 in which the court deals with the duty of a driver when faced with a sudden emergency. On the facts of that case the court found that there had been no negligence.

Medical negligence
In *S v McGown* 1995 (1) ZLR 4 (H) an anaesthetist was found guilty of culpable homicide because it is generally the case that if a medical practitioner departs from approved practices for no good cause and death results, he is likely to be found to have been negligent.
In the civil case of *Chibage v Ndawana* 2009 (2) ZLR 387 (H) the court stated that the test to decide whether there has been professional negligence on part of medical practitioner is the standard average reasonable professional doctor. See also *Thebe v Mbewe t/a Checkpoint Laboratory Services* 2000 (1) ZLR 578 (S).

In *S v Mkwetshana* 1965 (2) SA 493 (N) a junior doctor, administered the wrong dosage of a medicine. The patient died. The doctor found guilty of culpable homicide.
In *S v Kramer & Anor* 1987 (1) SA 887 (W) an anaesthetist was found guilty when the patient died after X had placed the breathing tube down the wrong passage and the patient had suffocated.

Persons with specialised knowledge
In *S v Meyer* 1971 (1) RLR 62 (G) the court dealt with the test for persons with specialised knowledge. Here an electrician had allowed a person to touch live wires leading to that person’s death. He was found guilty of culpable homicide.

Killing person in course of arresting him
*Sanyanga* S-106-86 – X exceeded the right to use moderate force. He was found guilty.

The thin skull rule
In cases of culpable homicide the thin skull rule applies.

In *R v John* 1969 (2) RLR 23 (A); 1969 (2) SA 560 (RA) the court stated that

An accused who intentionally assaults his victim by striking him a moderate blow does not necessarily escape liability if death would not have resulted save for some exceptional physical peculiarity of his victim such as an eggshell skull or weak heart ... Eggshell skulls, weak hearts and other human ailments which may cause a man to die are well within the range of ordinary human experience.

The thin skull rule was applied in the following cases leading to the accused being convicted of culpable homicide when they had assaulted their victims and the victims had died.
In *R v Dikwi* 1940 SR 19 D had a thin skull. The blow to the head caused the death of D. This blow would not have killed a person with a normal skull. X was found guilty of culpable homicide.

In *R v Mara* 1965 RLR 494 (G) X assaulted D severely and this led, D, who had a weak heart to die of a heart attack. X was found guilty of culpable homicide.

In *S v Chirau & Ors* A-180-78 prior to the assault D had had a perforated bowel. A moderate blow to the stomach had caused death. The accused were found guilty of culpable homicide.

The thin skull does not, however, mean that X is automatically guilty of culpable homicide if he or she assaults a victim and death results. If the assault is a minor one, the end result of death may not be reasonably foreseeable.

For instance, in *S v Ncube* GB-47-80 during a minor tussle one of the people involved, D, suffered haemorrhaging into lung cavity probably precipitated by exertion of struggle combined with tubercular condition from which deceased suffered. The court held that the thin skull rule did not apply as death was not reasonably foreseeable in the circumstances.

In *S v Van As* 1976 (2) SA 921 (A) X was found not guilty of culpable homicide where he had slapped a fat man hard across the face and the man had fallen backwards, hitting his head on a concrete floor. The man had died from head injuries to his head caused by the fall onto the concrete floor. He was found not guilty as the death was not reasonably foreseeable in the circumstances.

### Penalty

<table>
<thead>
<tr>
<th></th>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Life imprisonment or any shorter period of imprisonment</td>
<td>Both</td>
<td></td>
</tr>
</tbody>
</table>

The maximum penalty of life imprisonment provided for this offence would ordinarily only be imposed upon X in a case which bordered on murder but the State was not able to prove beyond reasonable doubt that X acted with actual intent or that he or she realised that there was a real risk of death and took a conscious risk of causing death.

**Competent verdicts on charge of culpable homicide** [s 275 read with 4th Schedule]

- Inciting suicide;
- Rape;
- Public violence;
- Unlawful termination of pregnancy;
- Assault;
Threatening to commit murder;
Any crime of which a person might be convicted if charged with any of the crimes above.

See Guide pp 82-85 and 192-202 for cases on culpable homicide.

---

**Inciting or assisting suicide**

[s 50]

Where a person encourages another to commit suicide or assists that person to commit suicide, it is theoretically possible to charge a person with murder or culpable homicide, but there may be problems in proving the required state of mind and the causation requirement. However, in South Africa, successful prosecutions for homicide have been brought. See for instance the case of S v S S v Grotjohn 1970 (2) SA 355 (A).

To overcome these problems of proof of homicide, the Code creates the new crime of inciting or assisting suicide.

**Ingredients**

- X knows that Y intends to commit suicide or realises that there a real risk that Y will do this; and
- X incites, induces, aids, counsels, procures or provides the means for the person to commit suicide or attempt to do so.

**Penalty**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine</td>
<td>Prison</td>
<td>Both</td>
</tr>
<tr>
<td>Up to or exceeding level 14</td>
<td>For life or any shorter period</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts on this charge** [s 275 read with 4th Schedule]

- Attempted murder;
- Culpable homicide;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

**When life starts and ends**

[s 51]

This defines when life is deemed to commence or cease in cases of murder, infanticide, culpable homicide and inciting suicide.

**Start of life** [s 51(1)]
The definition of the commencement of life is taken from s 303 of the Criminal Procedure and Evidence Act. Life is deemed to have commenced when a newly-born child has breathed, whether or not it has an independent circulation at that time and whether or not it is entirely separated from the body of its mother.

**End of life [s 51(2)]**

The existing identification of the time of death with the cessation of the heart-lung functions is extended to brain death where a person is attached to a life-support system and is diagnosed and confirmed as having suffered brain death. (See also s 54(2) which deals with the circumstances in which the High Court, on application can order the removal of a person from a medical life support system.)

---

**Causing death by accelerating death**

[s 52]

This provides that accelerating someone’s death will be treated as causing that death.

---

**Guidelines for causation where death results**

[s 53]

This provides a non-exhaustive list of guidelines for the courts to follow when difficult questions of causation arise in cases where the death of a victim is in issue.

*Abnormal event (unlikely from human experience to follow from conduct)*

This will break the causal link unless X anticipated or planned this event.

*Mortal or serious injury inflicted*

Where X inflicts such an injury on Y and Y dies, X will normally be held causally responsible for the death.

*Whether Y’s subsequent conduct voluntary*

Where Y’s subsequent conduct is voluntary, this is more likely to break the causal link than forced and involuntary conduct on Y’s part.

**Cases on the application of these guiding principles**

See Guide pp 217-218 for cases dealing with the application of these guidelines in cases of murder. See also the South African case of S v Daniels 1983 (3) SA 275 (A). In that case the court had to deal with a situation where one person had shot and mortally wounded the deceased and a second person had then come and shot him in the head causing his immediate death. If the two assailants had not acted with common purpose but instead had acted independently of one another, the question then was which of the two was causally responsible for the death?

**Thin skulls and special susceptibilities**
It is within the range of ordinary human experience that particular persons may suffer from ailments or physical susceptibilities that make them more liable than other persons to die from assaults or from other unlawful conduct.

*Cases on the thin skull rule*

In *R v John* 1969 (2) RLR 23; 1969 (2) SA 560 (RA) the court said—

An accused who intentionally assaults his victim by striking him a moderate blow does not necessarily escape liability if death would not have resulted save for some exceptional physical peculiarity of his victim such as an eggshell skull or weak heart ... Eggshell skulls, weak hearts and other human ailments which may cause a man to die from a trivial assault are well within the range of ordinary human experience.

Although the John case makes reference to trivial assaults, later case law stresses that if the assault is a very minor one the end result of death may not be reasonably foreseeable.

Thus in the case of *S v Ncube* GB-47-80 during a minor tussle one of the people involved, Y, suffered haemorrhaging into lung cavity probably precipitated by exertion of struggle combined with tubercular condition from which deceased suffered. The court held that the thin skull rule did not apply, as death was not reasonably foreseeable in the circumstances.

So too in the South African case of *S v Van As* 1976 (2) SA 921 (A) X was found not guilty of culpable homicide where he slapped a fat man hard across the face and the man fell backwards, hit his head on a concrete floor and died as a result.

*Failure to discharge a legal duty* [s 53(2)]

X is causally responsible for Y’s death if the death results from a failure by X to discharge a legal duty.

---

**Mercy killing**

[s 54(1)]

The Code retains the common law position that mercy killing is murder, but the fact that the killing was done at the request of the victim to relieve suffering can be taken into account in mitigation of sentence.

See *Guide* pp 101 & 217.

*Cases*

In *S v Mayer* 1985 (4) SA 332 (ZH) an elderly couple decided to commit suicide because they felt that they were destitute. X, the husband, killed his wife and tried to kill himself. He survived but he blinded himself in the suicide attempt. He was found guilty of murder but the circumstances were taken into account in mitigation of sentence.
In *S v Hartmann* 1975 (3) SA 332 (C) a doctor ended the life of his terminally ill father who had pleaded for him to do so. He was found guilty of murder but the circumstances were taken into account for the purposes of sentence.

---

**Removal of person from life support system**

*[s 54(2)]*

This is a new provision that allows the High Court, on application from a person such as a spouse or close relative, to order the removal of a person from a heart-lung or ventilator machine or other life support system in certain circumstances. The High Court can so order on the basis of evidence by a medical practitioner other than the patient’s doctor that—

- the patient is unconscious and there is no reasonable prospect of that person regaining consciousness; and
- although the patient’s brain functions may not have entirely ceased, that person’s life is being artificially sustained by the life support system and there is no reasonable prospect that the patient will ever be able to survive without being on the life support system.

**Case**

In *Clarke v Hurst NO & Ors* 1992 (4) SA 630 (D) upon receiving evidence that a person had been in an irreversible vegetative state for a long period, kept alive by artificial feeding, the court appointed his wife as *curatrix personae* with power to authorise the discontinuance of the feeding, notwithstanding that it might hasten the patient’s death. Before the heart-attack which had brought about his present condition, the patient (who was a medical practitioner with strong views on an individual’s right to die with dignity) had signed a “living will” in which he directed that in the event of there being no reasonable expectation of his recovery from extreme physical or mental disability, he should be allowed to die and not be kept alive by artificial means and “heroic” measures. The court held that if she authorised the discontinuance of the feeding the wife would not be acting unlawfully, viewed in the light of society’s *boni mores*. Nor would her action be the legal cause of the patient’s death.

---

**Causing death by disposal of body**

*[s 55]*

**Murder or infanticide** *[s 55(1) & (2)]*

This lays down that a person can be convicted of murder or infanticide where—

- X, intending to kill Y, tries to kill Y; and,
- mistakenly thinking that Y has died, disposes of body; and
- Y dies as a result of X disposing of the body.

Thus if X attacks Y intending to kill Y and thinking that Y is dead buries him or throws him into a river with weights attached to his body and Y dies from suffocation or drowning, X is still
guilty of murder. This applies whether X formed the intention to dispose of Y’s body before X attacked him or during or after the attack.

*Other crimes* [s 55(3)]

Where X attacked Y but did not intend to kill him and X, mistakenly thinking that Y is dead disposes of Y’s body and causes his death, X can be convicted of culpable homicide or any other crime arising out of the disposal or attempted disposal of Y’s body.

See *Guide* p 105.

---

**Mistaking identity of murder victim**

[s 56]

This section restates the current law that mistaking the identity of the victim is no defence to a charge of murder. In addition, this defence will not avail against a charge of infanticide or culpable homicide.

Thus if X, with intent to kill, attacks and kills Y thinking that Y is Z, X is guilty of murder.

See *Guide* p 105 & p 222.
Causing death of person by blow intended for another (Deflected blow or blow that goes astray)

[s 57]

This section deals with the following situation: X attacks Y intending to kill him or her but the blow misses or is deflected and ends up causing the death of Z or injuring Z.

This section provides as follows—

X’s liability towards Y –

- if Y dies, X is liable for murder, infanticide or culpable homicide;
- if Y does not die, X is liable for attempted murder, attempted infanticide or assault.

X’s liability towards Z –

- if Z dies, murder or infanticide if he or she realised that there was a real risk or possibility that the “bystander” might be killed;
- if Z dies, culpable homicide if X did not realise that there was a real risk or possibility of Z dying but a reasonable person would have realised this.

See Guide 105-106.

See also S v Ncube 1983 (2) ZLR 111 (S) which overrules the earlier case of R v Mabena 1967 1968 1 RLR 1 (A)

In S v Richards 2001 (1) ZLR 129 (S) a youth, aged 16, had fired a .22 rifle at a bird which was near an inhabited farm compound. No person was visible to the youth who fired the weapon but the bullet ricocheted and killed a child who was hiding in a drum nearby. The youth was acquitted on the charge of murder but was found guilty of culpable homicide.

In S v Tissen 1979 (4) SA 293 (T) in a crowded street X fired several shots at S one of which hit and killed a bystander, D. X was found guilty of murder, the court finding that in shooting at the intended victim in a crowded street X must have foreseen the possibility of hitting and killing of a bystander and X had continued to shoot recklessly.

Joining in attack after fatal blow inflicted

[s 58]

This clarifies the existing law on the question of the appropriate charge for an accused who joins an attack upon a person who is already mortally injured by others.

If the intervention of the accused accelerated the death of the victim, the competent charge would (according to the circumstances of the case and the state of mind of the accused) be murder, infanticide or culpable homicide, even if the accused did not strike the initial fatal blow.

See Guide pp 103-104.
**Unlawful Termination of Pregnancy**

[ss 59 and 60]

**Ingredients** [s 60(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
</table>
| X unlawfully terminates a pregnancy | X intends to terminate the pregnancy; or  
X engages in conduct that X realises involves a real risk of terminating the pregnancy. |

“Terminate” in relation to a pregnancy means to cause the death of an embryo or foetus.

“embryo or foetus” means a live embryo or foetus.

**Defences** [s 60(2)]

It is a defence to this charge for X to prove that—

- the termination occurred in the course of a Caesarian section, that is, while delivering a foetus through the incised abdomen and womb of the mother in accordance with medically recognised procedures; or
- the pregnancy was terminated in accordance with the Termination of Pregnancy Act.

A termination of a pregnancy is lawful if carried out by a medical practitioner in terms of the Termination of Pregnancy Act. Under this Act the grounds upon which a medical practitioner may lawfully terminate pregnancy are these—

- The pregnancy constitutes a threat to the life of mother;
- There is a serious threat of permanent impairment of mother’s physical health;
- There is a serious risk that child will be born with a physical or mental defect which will permanently and seriously handicap him or her;
- There is a reasonable possibility that pregnancy resulted from unlawful intercourse (i.e. rape, other than rape within marriage, or sexual intercourse within a prohibited degree of relationship, other than sexual intercourse between cousins or between an ascendant or descendant of that person’s spouse.)

**Termination of ectopic pregnancy** [s 59(1)]

“Womb” is defined so as to exclude fallopian tubes. This is intended to exclude from the scope of this crime the termination of an “ectopic pregnancy”, which has no possibility of resulting in a live birth. An ectopic pregnancy is an abnormal pregnancy that occurs outside the womb, usually in the fallopian tube.

**Penalty** [s 60(1)]
<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts on this charge** [s 275 read with 4th Schedule]

- Assault;
- Indecent assault;
- Concealing birth of child;
- Any crime of which a person might be convicted if charged with any of the crimes above.

**Case**

In *S v Banda* 2001 (1) ZLR 219 (H) X, who admitted to being pregnant, took a concoction of traditional herbs with intent to procure an abortion. The foetus was expelled from her uterus, but there was no evidence or admission that the foetus was alive. The court held, that since the section requires, for conviction, that the foetus be alive, X could be convicted only of an attempt to procure an abortion.

**Comment**

**Abolition of common law crime**

In terms of the Code Roman-Dutch common law no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.

Previously according to a number of High Court cases, namely *S v Mapuranga* HB-242-86; *S v Makoni* HH-320-87 and *S v Ncube* HB-148-88, the common law offence of abortion was entirely replaced by the offence under the Termination of Pregnancy Act and therefore persons who would previously have been charged with abortion should now be charged with contravening s 3 as read with s 12(1)(a) of that Act. These cases follow a South African judgment in *S v Kruger* 1976 (3) SA 290 (O) in which it was decided that the South African legislation on termination of pregnancy had impliedly abolished the common law offence. In that case it was reasoned that if the common law were to co-exist with the legislation, there would be an anomaly as if charged under the common law X the only defence he could raise would be necessity, whereas if X is charged under the statutory offence he could rely on a number of defences set out in the Act. The legislature could not have intended this anomaly. It would seem that the courts would adopt the same approach would therefore seem to apply in relation to the crime of abortion in the Code. In other words the courts would rule that the crime of unlawful termination of pregnancy in the Criminal Law Code has supplanted the common law crime of abortion.

However, if the offence under the Termination of Pregnancy Act has replaced the common law offence, maximum penalty for this offence surely needs to be increased, as five years imprisonment is totally inadequate for a situation like the one where a backstreet abortionist very
nearly kills the mother at the same time as killing the foetus or where he has previous convictions for abortion.

Post-coital contraceptives

There are some problems with post-coital contraceptives such as the so-called “day-after” contraceptive pill or post-coital insertion of an IUD in order to prevent implantation of a fertilized ovum in the womb. Implantation of the fertilized egg normally occurs after six days. If these devices are used before six days have elapsed they can prevent implantation.

If these techniques amount to termination of pregnancy because the fertilized ovum constitutes a foetus or embryo for the purposes of the Act, then these techniques could only be lawfully employed if one of the lawful grounds for termination is present. The better view is that the use of contraceptive techniques that prevent implantation do not amount to unlawful termination of pregnancy.

Can a mother who is HIV positive have a lawful abortion?

One question that still remains to be settled is whether a mother who is HIV positive may obtain a lawful termination of her pregnancy. It is clear that if she already has full blown AIDS, the pregnancy would pose a threat to her physical health and she would be entitled to have the pregnancy terminated on this ground. If, however, she has not yet developed full-blown AIDS, there is no convincing evidence that in her HIV positive condition the continuation of the pregnancy will have adverse effects on her physical health. Thus the only ground upon which she could seek to rely for having a lawful termination of her pregnancy is that there is a serious risk that child will be born with a physical defect which will permanently and seriously handicap him or her. As there is a significant risk that the mother will transmit HIV to her unborn child, it is arguable that the eugenic ground covers this situation. The legal position is not, however, entirely clear. See 1989 Vol 1 No 6 Legal Forum 23. However, the Zimbabwean College of Obstetricians firmly believes that this situation is covered by the eugenic clause and this view is shared by the Ministry of Health.

There can be no doubt that the mother should definitely be entitled to have her pregnancy terminated in these circumstances if she so wishes. She herself is infected with this fatal virus and it would be extremely cruel to oblige her to carry her pregnancy to term knowing that there is a significant chance that her child will be born HIV positive and will suffer grievously before dying within a few years of birth.

---

Sexual Crimes and Crimes Against Morality

Sections 61 to 87 consolidate and to some extent reform the existing law with respect to sexual offences and offences against morality generally.
Defence of marriage

[s 62]
This re-enacts s 20 of the Sexual Offences Act.
Where X is accused of committing offences involving extra-marital sexual intercourse and X pleads the defence that he or she was married to the person concerned, X bears the onus of proving that they were married to the alleged victim at the time of the alleged offence.

Boys under 12

[s 63]
This re-enacts s 22 of the Sexual Offences Act.
It provides that boys under the age of 12 are presumed to be incapable of sexual intercourse. (Previously the presumption applied to boys under the age of 14.) Thus a boy under the age of 12 cannot commit the crime of rape.

Presumptions relating to capacity to consent to sexual acts

[s 64]

Boys and girls under 12 [s 64(1)]
This substantially re-enacts in s 23(1) of the Sexual Offences Act.
Both girls and boys of or below the age of 12 are irrebuttable presumed to be incapable of consenting to sexual intercourse. (Previously under the common law this presumption applied only to girls.)
Girls and boys of or below the age of 12 are also irrebuttable presumed to be incapable of consenting to anal intercourse and other indecent acts. Thus X cannot plead the defence of consent where the girl or boy in question is under 12.

Boys and girls between 12 and 14 [s 64(2)]
This introduces a rebuttable presumption that young persons above the age of 12 but of or below the age of 14 are incapable of giving consent to sexual acts. The presumption can be rebutted by evidence showing that the girl or boy in question was capable of giving consent and did actually give consent.

Mentally incompetent persons [s 64(3)]
This replaces s 4 of the Sexual Offences Act, which rendered criminal all sexual acts with mentally incompetent persons. The new provision in the Code renders such conduct criminal only
if it is shown that the mentally incompetent person was incapable of consenting to such acts, or, if capable, did not consent to such acts.

Medical evidence of the mental incompetence of the victim must be produced.

See *S v Chamukwanda* 1990 (1) ZLR 172 (H) and *S v Mbizi* 1989 (3) ZLR 317 (S) but note that these cases dealt with the old offence of engaging in sexual conduct with “female idiot or imbecile.”

---

**Rape**

*[s 65]*

Rape continues to be a crime that is committed by a male on a female. Under the common law the crime of rape was committed when a male has vaginal sexual intercourse with a female without her consent. (Although a female who assists a man to rape a woman is guilty of the crime of rape as an accomplice). The crime of rape as codified has extended rape to cover a situation where the male has non-consensual anal intercourse with the female. *[s 65(1)]*(Previously under the common law where a male had anal intercourse with a woman without her consent, he would have to be charged with indecent assault because rape was not defined so as to encompass anal sexual intercourse.)

**Ingredients** *[s 65(1)]*

X, a male person,

- knowingly has vaginal sexual intercourse or anal sexual intercourse with Y, a female person;
- at the time of the sexual intercourse Y has not consented to sexual intercourse; and
- X knows that Y has not consented or realises that there is a real risk that she may not have consented.

Thus the mental aspect of this crime involves knowingly having sexual intercourse knowing that Y has not consented or realising that there is a real risk that she may not have consented.

**Penetration**

Rape is committed if there is the slightest penetration of the female genitals or the anus. It is not necessary that there should be full penetration. The medical definition of what constitutes penetration does not accord with the legal requirement for the crime of rape. See *S v Mhanje* 2000 (2) ZLR 20 (H) and *S v Banda* (1) 2002 (1) ZLR 156 (H).

**Husband can rape wife** *[s 68]*

It is not a defence to a charge of rape that the person raped was the spouse of the accused person at the time of any sexual intercourse. However, it is further provided that no prosecution may be
instituted against any husband for raping his wife in contravention unless the Attorney-General has authorised such a prosecution.

*Rape by boys*

Previously a boy under 14 could not commit rape. Now a boy over 12 but under 14 is *rebuttably* presumed to be incapable of committing rape – he can be convicted of rape if the presumption is rebutted. [s 63]

*Where consent absent or vitiuated* [s 69]

See below for the circumstances under which consent to sexual intercourse or an indecent act is absent or is vitiates (invalidated).

*Girl of or under 12 incapable of giving consent to sexual intercourse* [s 64(1) and 70(4)]

A girl of or under the age of 12 is *irrebuttably* presumed to be incapable of giving her consent to sexual intercourse. Anyone who has sexual intercourse with such a girl commits rape as she cannot give consent and is treated as a non-consenting party. In terms of section

Section 70(4) provides “For the avoidance of doubt … *the competent charge* against a person who has sexual intercourse with a female person below the age of twelve years *shall be* rape … and not sexual intercourse with a young person” (emphasis added). Thus if the young person has reached, but not passed, her 12th birthday, the charge *must* be one of rape, irrespective of whether there is evidence of consent.

*Case*

In *S v Dube* HB-116-10 the accused, allegedly aged 18 years, was charged with having extra-marital sexual intercourse with a young person, in contravention of s 70(1)(a) of the Criminal Law Code [*Chapter 9:23*]. The age of the girl was said in the charge sheet to be 12 years, but no evidence of her age was led. The accused pleaded guilty but denied knowing her age. When the accused was questioned about his understanding of the essential elements of the offence, he did not admit knowing that she was a “young person” as defined in the Code. Section 61 defines “young person” as a “boy or girl under the age of 16 years”. No minimum age is provided. The scrutinising regional magistrate was of the view that, in the light of s 64(1) of the Code, the accused should have been charged with rape. It was held that it is always critical to determine the exact age of the complainant in cases involving the sexual abuse of children. This derives from the provisions of the Code which give rise to varying types of charges and the penalties to be meted out. What was placed before the court was patently incomplete, if not inaccurate, information. To say the complainant was aged 12 years was inaccurate and problematic, as it was not clear whether she was celebrating her 12th birthday on the day of the offence, or had already attained that age or was in her 12th year. It was therefore necessary to ascertain the exact age by means of her birth certificate and/or medical evidence as to her probable age if the date of birth was not known. None of this was done. The Code restates the common law position that young persons of and under the age of 12 are incapable of consenting to sexual intercourse. Offenders against this group should not be charged under s 70(1), which relates to sexual intercourse with a young person. Section 70(4) buttresses this position.
Consent by girl over 12 but of or below 14 [s 64(2)]

For the purposes of rape a girl over 12 but of or below the age of 14 is rebuttably presumed to be incapable of giving consent to sexual intercourse. This presumption can be rebutted by evidence showing that the girl in question was capable of giving consent and did actually give consent.

X cannot be found guilty of rape of such a girl if the court finds that the presumption has been rebutted because the evidence shows that the girl had the capacity to consent and did in fact consent. However, X is still guilty of the crime of “sexual intercourse with young persons” in contravention of s 70 of the Code.

If on the other hand, the court finds that evidence shows that the girl in question lacked the capacity to consent, then for the purposes of a rape charge the sexual intercourse will be deemed to have been without the consent of the girl.

Consensual sexual intercourse with girls [s 70]

“Consensual” sexual intercourse with a girl of or above the of 12 but below the age of 14 (where the presumption of lack of capacity to consent has been rebutted) or of or above the age of 14 but below the age of 16, is punishable under the separate offence of sexual intercourse or performing indecent acts with a young person in s 70.

Penalty [s 65(1)]

Imprisonment for life or any shorter period.

Factors in sentencing [s 65(2)]

In sentencing X for rape the court is required to have regard to all relevant factors including certain factors which may have aggravated the crime, such as the age of the victim, the extent of physical and psychological injury inflicted and whether the offender was infected with a sexually-transmitted disease at the time of the rape. The full list of factors is as follows–

- the age of the person raped;
- the degree of force or violence used in the rape;
- the extent of physical and psychological injury inflicted upon the person raped;
- the number of persons who took part in the rape;
- the age of the person who committed the rape;
- whether or not any weapon was used in the commission of the rape;
- whether the person committing the rape was related to the person raped in any of the degrees mentioned in subsection (1) of section seventy-five;
- whether the person committing the rape was the parent or guardian of, or in a position of authority over, the person raped;
- whether the person committing the rape was infected with a sexually-transmitted disease at the time of the rape.

Competent verdicts on charge of rape [s 275 read with 4th Schedule]
- Aggravated indecent assault;
- Indecent assault;
- Sexual intercourse with or indecent assault of young person;
- Sexual intercourse within a prohibited degree of relationship;
- Any crime of which a person might be convicted if charged with any of the crimes above.
**Aggravated indecent assault**

[s 66]

The crime of aggravated indecent assault involves the non-consensual penetration with indecent intent of any part of the body of the victim or perpetrator. It is more serious than the crime of indecent assault, which does not involve any such penetration.

**Ingredients [s 66(1)]**

This crime is committed as follows

<table>
<thead>
<tr>
<th>By male on female</th>
<th>By male on male</th>
<th>By female on male</th>
<th>By female on female</th>
</tr>
</thead>
<tbody>
<tr>
<td>By a non-consensual act other than sexual intercourse or anal sexual intercourse, involving penetration of any part of female’s body or male’s body. This includes</td>
<td>By non-consensual anal sexual intercourse with male victim or any other act involving penetration of any part of the male victim’s body; or the body of the male assailant.</td>
<td>By non-consensual sexual intercourse with male or any other act with male involving penetration of any part of male person’s body; or the body of female assailant.</td>
<td>By any non-consensual act involving penetration of any part of female victim’s body; or the body of the female assailant.</td>
</tr>
<tr>
<td>insertion of penis into mouth of female;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>insertion of man’s tongue or object into her vagina;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>insertion of object other than penis into her anus.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Case**

In *S v Tapindwa* HB-97-09 the appellant, a male aged 21 years, pleaded guilty to two counts of aggravated indecent assault, in contravention of s 66(1)(a) of the Criminal Law Code. The section penalises a male person who commits upon a male person anal sexual intercourse or any other act involving the penetration of any part of the other male person’s body. The complainants were boys aged 9 and 10 years, respectively. The agreed facts were that the appellant took each of the complainants and made him lie facing downwards, with his trousers at knee level, and that the appellant inserted his penis between the complainant’s buttocks. In respect of one complainant,
the appellant forced the boy to suck the appellant’s penis. It was argued on the appellant’s behalf that penetration had not been proved.

It was held that the appellant had inserted his penis into the complainant’s buttocks, thereby penetrating each complainant’s body. He had also penetrated the complainant’s mouth. The very fact that he inserted his penis into the complainant’s buttocks suffices to constitute the offence of aggravated indecent assault. It was immaterial whether or not he went through sexual motions and completed his purpose. It was also irrelevant whether or not penetration was vertical or horizontal. Similarly, it was also immaterial whether or not he went through sexual motions and completed his purpose when he penetrated the complainant’s mouth.

_Husband can commit aggravated indecent assault on wife [s 68]_

It is not a defence to a charge of aggravated assault that the person assaulted was his spouse of the accused at the time of the assault. However, it is further provided that no prosecution may be instituted against any husband for raping his wife in contravention unless the Attorney-General has authorised such a prosecution.

_Competent verdicts on charge of aggravated indecent assault [s 275 read with 4th Schedule]_

- Indecent assault

---

**Presumptions relating to capacity to consent to sexual acts**

[s 64]

_Boys and girls under 12 [s 64(1)]_

Both girls and boys of or below the age of 12 are irrebuttably presumed to be incapable of consenting to sexual acts constituting aggravated indecent assault. Thus consent of a girl or boy under 12 cannot be pleaded as a defence to a charge of aggravated assault.

_Boys and girls between 12 and 14 [s 64(2)]_

There is now a rebuttable presumption that young persons over 12 but of or below the age of 14 are incapable of giving consent to sexual acts that would constitute aggravated indecent assault. The presumption can be rebutted by evidence showing that the girl or boy in question was capable of giving consent and did actually give consent.

_Where consent absent or vitiated [s 69]_

See later for the circumstances under which consent to sexual intercourse or an indecent act is absent or is vitiated (invalidated).

_Penalty [s 66(1)]_

88
A person found guilty of aggravated indecent assault is liable to the same punishment as for rape (imprisonment for life or any shorter period).

The court must have regard to the same factors that under have to be taken into account when sentencing a person for rape. These factors are—

- the age of the person indecently assaulted;
- the degree of force or violence used in the indecent assault;
- the extent of physical and psychological injury inflicted upon the person indecently assaulted;
- the number of persons who took part in the indecent assault;
- the age of the person who committed the indecent assault;
- whether or not any weapon was used in the commission of the indecent assault;
- whether the person committing the indecent was related within the prohibited degrees of relationship provided for in s 75;
- whether the person committing the indecent assault was the parent or guardian of, or in a position of authority over, the person indecently assaulted;
- whether the person committing the indecent assault was infected with a sexually transmitted disease at the time of the indecent assault.

**Case**

In *S v Magwenzi* 1994 (1) ZLR 442 (H) Chidyausiku J, as he then was, observed that where a man forcibly sodomises another, it is no different from rape. The act is as degrading, if not more so because it is unnatural. Where the complainant is of tender years, he is likely to be traumatised and corrupted. In this case, a 27-year-old man committed sodomy on his 8-year-old brother, who was entitled to his protection.

---

**Indecent assault**

[s 67]

This crime can be committed by a male on a female or a male or by a female on a male or a female.

**Ingredients** [s 67 (1)]

<table>
<thead>
<tr>
<th>By male on female</th>
<th>By male on male</th>
<th>By female on male</th>
<th>By female on female</th>
</tr>
</thead>
<tbody>
<tr>
<td>A male with indecent intent and knowing or realising that there is a</td>
<td>A male with indecent intent and knowing or realising that there is a</td>
<td>A female with indecent intent and knowing or realising</td>
<td>A female with indecent intent and knowing or realising</td>
</tr>
</tbody>
</table>
real risk that the female has not consented commits on the female any indecent act involving physical contact, other than sexual intercourse or anal sexual intercourse or other act involving the penetration of any part of the female’s body or of his own body

real risk that the male has not consented commits on the male any indecent act involving physical contact, other than anal sexual intercourse or other act involving the penetration of any part of the other male’s body or of his own body

that there is a real risk that the male has not consented commits on the male any indecent act involving physical contact, other than sexual intercourse or other act involving the penetration of any part of the male’s body or her own body

realising that there is a real risk that the female has not consented commits on a female any indecent act involving physical contact, other than any act involving the penetration of any part of the other female’s body or of her own body.

An indecent act is any act that would be regarded by a reasonable person to be an indecent act. An example would be touching or fondling by a man of a woman’s breasts or buttocks.

**Boys and girls under 12 [s 64(1)]**

Both girls and boys or below the age of 12 are irrebuttably presumed to be incapable of consenting to sexual acts constituting aggravated assault. Thus consent of a girl or boy under 12 cannot be pleaded as a defence to a charge of aggravated assault.

**Boys and girls between 12 and 14 [s 64(2)]**

There is a now rebuttable presumption that young persons over 12 but of or below the age of 14 are incapable of giving consent to sexual acts that would constitute indecent assault. The presumption can be rebutted by evidence showing that the girl or boy in question was capable of giving consent and did actually give consent.

**Where consent absent or vitiated [s 69]**

See later for the circumstances under which consent to sexual intercourse or an indecent act is absent or is vitiated (invalidated).

**Penalty [s 67(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 7</td>
<td>Up to 2 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Factors in sentencing [s 67(2)]**

The court sentencing X for this crime must have regard to same factors as those that are taken into account in a case of rape.
➢ the age of the person indecently assaulted;
➢ the degree of force or violence used in the indecent assault;
➢ the extent of physical and psychological injury inflicted upon the person indecently assaulted;
➢ the number of persons who took part in the indecent assault;
➢ the age of the person who committed the indecent assault;
➢ whether or not any weapon was used in the commission of the indecent assault;
➢ whether the person committing the indecent was related to the person raped within the prohibited degrees of relationship provided in s 75;
➢ whether the person committing the indecent assault was the parent or guardian of, or in a position of authority over, the person indecently assaulted;
➢ whether the person committing the indecent assault was infected with a sexually-transmitted disease at the time of the indecent assault.

Competent charges on charge of indecent assault

Attempted indecent assault [s 67(3)]

X is guilty of attempted indecent assault if X would have been guilty of indecent assault but for the fact that he or she failed to make the physical contact that he or she intended.

When guilty of criminal insult and not indecent assault [s 67(3)]

X is guilty of criminal insult if X would have been guilty of indecent assault but for the fact that indecent intent was absent.

Competent verdicts [s 275 read with 4th Schedule]

➢ Sexual intercourse with or performing an indecent act with a young person;
➢ Criminal insult;
➢ Any crime of which a person might be convicted if he or she were charged with sexual intercourse with or performing an indecent act with a young person.

Unavailable defences to rape, aggravated indecent assault and indecent assault

[s 68]

This abolishes or reiterates the abolition of certain archaic common law presumptions applicable to the offence of rape and indecent assault. These are the presumptions–

➢ that a husband cannot rape his wife (a presumption originated from the outmoded notion of the wife’s legal subjection to her husband)
➢ that a boy under the age of 14 years is incapable of sexual intercourse.
However, no proceedings may be taken against any person accused of raping or indecently assaulting his or her spouse except with the leave of the Attorney-General.

---

**Guide to correct charges in cases involving young persons**

Section 70(4) gives guidance as to the correct charges in various situations as follows—

<table>
<thead>
<tr>
<th>Person upon whom act committed</th>
<th>Accused person</th>
<th>Sexual act</th>
<th>Whether consent</th>
<th>Correct charge</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Girl below 12</td>
<td>Male over 12</td>
<td>Vaginal or anal sexual intercourse</td>
<td>Irrelevant as girls below 12 incapable of consenting</td>
<td>Rape</td>
<td>Girls of or below 12 irrebuttable presumed to be incapable of consenting to sexual intercourse</td>
</tr>
<tr>
<td>Girl of or over the age of 12 but under 16</td>
<td>Male over 12</td>
<td>Vaginal or anal sexual intercourse without consent of girl</td>
<td>No consent</td>
<td>Rape</td>
<td>Girl was not consenting party</td>
</tr>
<tr>
<td>Girl or boy below 12</td>
<td>Male or female over 12</td>
<td>Penetration of body of girl or boy or body of accused other than vaginal or anal sexual intercourse</td>
<td>Irrelevant as girls or boys below 12 are incapable of consenting</td>
<td>Aggravated indecent assault</td>
<td>Girls and boys below 12 are irrebuttable presumed to be incapable of consenting to sexual act</td>
</tr>
<tr>
<td>Girl or boy below 12</td>
<td>Male or female over 12</td>
<td>Act involving physical contact of indecent nature</td>
<td>Irrelevant as girls below 12 incapable of consenting</td>
<td>Indecent assault</td>
<td>Girls and boys below 12 irrebuttable presumed to be incapable of consenting to sexual act</td>
</tr>
<tr>
<td>Girl or boy of or over the age of 12 but below 16</td>
<td>Male or female over 12</td>
<td>Penetration of body of girl or boy or body of</td>
<td>No consent</td>
<td>Aggravated indecent assault</td>
<td>Girl or boy was not consenting party</td>
</tr>
<tr>
<td>accused</td>
<td>Male or female over 12</td>
<td>Act involving physical contact of indecent nature</td>
<td>No consent</td>
<td>Indecent assault</td>
<td>Girl or boy was not consenting party</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------</td>
<td>-------------------------------------------------</td>
<td>------------</td>
<td>-----------------</td>
<td>-----------------------------------</td>
</tr>
</tbody>
</table>

---

**Where consent absent or vitiated**

[s 69]

This sets out the circumstances under which consent to sexual intercourse or an indecent act is absent or is vitiated (invalidated) for the purpose of establishing whether rape, aggravated indecent assault or indecent assault was committed. These are where the person charged—

- has used violence, threats of violence or intimidation or unlawful pressure to induce the other person to submit;
- has used a fraudulent misrepresentation to induce the other person to believe that something other than sexual intercourse or an indecent act is taking place;
- by impersonating someone’s spouse or lover, induces the other person to have sexual intercourse or to submit to the performance of an indecent act;
- has sexual intercourse or performs an indecent act upon a sleeping person who has not given consent thereto prior to falling asleep;
- has sexual intercourse with or performs an indecent act upon a person who is under hypnosis or is so intoxicated that the person is incapable of giving consent and that person has not given consent before being hypnotised or becoming intoxicated.

**Unlawful pressure**

This would include a threat by a male employer to dismiss a female employee unless she agrees to have sexual intercourse with him. It would also include a threat by a police officer to arrest a woman unless she has sexual intercourse with him.

**Cases**

In *S v Volschenk* 1968 (2) PH H 283 (D) a policeman induced consent by threatening an arrested woman with prosecution. The policeman was found guilty of rape.

In *S v S* 1971 (2) SA 591 (A) a constable arrested a young woman and placed her in a car. He ordered her to lie on the back seat. When he went to have sex with her she said she was ill. Nonetheless he had sex with her. No force was used but the sexual intercourse was against her will and desire. She simply complied as she was afraid. The constable used his authority to overbear her lack of consent and he was thus guilty of rape.
Comment

It seems that other types of pressure could also vitiate consent as, for instance, where a housing officer induces consent to sexual intercourse or other forms of sexual conduct by threatening a woman with eviction from her house unless she has sexual intercourse with him.

Fraudulent misrepresentation vitiating consent

In R v Flattery [1877] 2 QB 410 X told a girl who was ill that he would cure her. The girl was unaware that she was having sexual intercourse. X was guilty.

In R v Williams [1923] 1 KB 340 X told a girl that he was performing an operation on her to improve her voice. She did not realise that sexual intercourse was taking place. He was guilty.

Fraudulent misrepresentation that does not vitiate consent

X will not be guilty of rape if Y consents to sexual intercourse, but X, by using a fraudulent misrepresentation has induced in Y a belief that certain consequences will follow upon the act of sexual intercourse e.g. that the act will cure her barrenness or that X will marry her if she gives her consent.

In R v Williams 1931(1) PH H 38 Y consented to sexual intercourse because X had told her that this would remedy a displacement of the womb. X was not guilty of rape.

In R v K 1965 RLR 571 (A) X led Y to believe that sexual intercourse was part of the cure for barrenness. As the misrepresentation related only to the results of the act and not its nature, X was not guilty of rape.

Unlawful sexual intercourse or indecent acts with young person

[s 70]

This section re-enacts s 4 of the Sexual Offences Act.

A young person is a male or female under the age of 16 [s 61].

This crime is committed when, with the consent of young person, a person over the age of 16 performs various sexual acts with the young person.

The reason why this crime is committed despite the fact that the young person has given consent is that the law seeks to protect young persons from sexual exploitation by older persons and to protect young persons against the harmful consequences that can emanate from early sexuality such as early pregnancies and contracting of sexually-transmitted diseases. The crime is thus committed even though the young person has consented to the sexual act. If the young person has not consented then the correct crime to charge is rape, sodomy, aggravated indecent assault or indecent assault.

Ingredients [s 70(1)]

This crime is committed if—
- a male has extra-marital sexual intercourse or performs indecent acts with a female under the age of 16 with her consent;
- a male performs an indecent act on a male person under the age of 16 with his consent;
- a female has extra-marital sexual intercourse or performs indecent acts with a male under the age of 16 with his consent;
- a female performs an indecent act with a female under the age of 16 with her consent.

This crime is not committed if the acts are committed between married persons. (Section 61 defines “extra-marital sexual intercourse” as “sexual intercourse otherwise than between spouses.”)

Consent of young person no defence [s 70(2)]

It is no defence to this charge to prove that the young person consented to sexual intercourse or to the indecent act.

Defence [s 70(3)]

It is a defence to this charge for X to show that he or she had reasonable cause to believe that the young person with whom he or she had sexual intercourse or engaged in an indecent act was over the age of 16. However, the apparent physical maturity of the young person concerned will not, on its own, constitute a reasonable cause for X to believe that the young person was 16 or over.

Penalty

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 12</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Competent verdicts on a charge of unlawful sexual intercourse or indecent acts with young person [s 275 read with 4th Schedule]

- Indecent assault;
- Sexual intercourse within a prohibited degree of relationship;
- Any crime of which a person might be convicted if charged with any of the crimes above.

In *S v Dube* HB-116-10 the court set out when X should be charged with rape rather than unlawful sexual intercourse or indecent acts with a young person. X, allegedly aged 18 years, was charged with having extra-marital sexual intercourse with a young person, in contravention of s 70(1)(a) of the Criminal Law Code [*Chapter 9:23*]. The age of the girl was said in the charge sheet to be 12 years, but no evidence of her age was led. The accused pleaded guilty but denied knowing her age. When the accused was questioned about his understanding of the essential elements of the offence, he did not admit knowing that she was a “young person” as defined in the Code. Section 61 defines “young person” as a “boy or girl under the age of 16 years”. No minimum age is provided. The scrutinising regional magistrate was of the view that, in the light of s 64(1) of the Code, the accused should have been charged with rape. This section provides
that “A person accused of engaging in sexual intercourse … with a young person of or under the age of 12 years shall be charged with rape … and not with sexual intercourse … with a young person”. The trial magistrate was of the view that s 70(4) of the Act was permissive in that it provides that rape is a competent charge for intercourse with a female person below the age of 12 years. Because the complainant was aged 12 years and not below the age of 12 years, the magistrate considered that a charge under s 70(1) was competent.

It was held that it is always critical to determine the exact age of the complainant in cases involving the sexual abuse of children. This derives from the provisions of the Code which give rise to varying types of charges and the penalties to be meted out. What was placed before the court was patently incomplete, if not inaccurate, information. To say the complainant was aged 12 years was inaccurate and problematic, as it was not clear whether she was celebrating her 12th birthday on the day of the offence, or had already attained that age or was in her 12th year. It was therefore necessary to ascertain the exact age by means of her birth certificate and/or medical evidence as to her probable age if the date of birth was not known. None of this was done. The same applied to the age of the accused. The Code restates the common law position that young persons of and under the age of 12 are incapable of consenting to sexual intercourse. Offenders against this group should not be charged under s 70(1), which relates to sexual intercourse with a young person. Section 70(4) buttresses this position.

**Comment on this case**

Section 64(2) of the Criminal Law Code provides—

“A person accused of engaging in sexual intercourse … with a young person above the age of 12 years but of or below the age of 14 years shall be charged with rape … and not with sexual intercourse … with a young person … unless there is evidence that the young person … was capable of giving consent to the sexual intercourse … and gave his or her consent thereto”.

This subsection allows the prosecution to bring a charge other than rape, if there is evidence of consent, where the complainant is “above the age of 12 years but of or below the age of 14 years”. Section 64(1) is misquoted in the judgment; consent is not mentioned.

The exact wording of s 70(4) is: “For the avoidance of doubt … the competent charge against a person who has sexual intercourse with a female person below the age of twelve years shall be rape … and not sexual intercourse with a young person” (emphasis added).

Thus, under s 64, if the young person has reached, but not passed, her 12th birthday, the charge must be one of rape, irrespective of whether there is evidence of consent. If she has passed her 12th birthday but has not passed her 14th birthday, the charge need not be one of rape if there is evidence of consent.

**Sexual crimes committed against young or mentally incompetent persons outside Zimbabwe**

[s 71]
This re-enacts s 5 of the Sexual Offences Act.

Ingredients [s 71(1)]

X who is a citizen of or ordinarily resident of Zimbabwe does anything outside Zimbabwe to, with or against a young or mentally incompetent person that, if it were done inside this country, would constitute–

- rape
- aggravated indecent assault;
- indecent assault;
- sexual intercourse or performing indecent act with young person;
- sodomy;
- an attempt, conspiracy or incitement to commit any of these crimes.

X is guilty of this crime whether or not the act in question was a crime in the place where it was committed. [s 71(3)]

Penalty [s 71(1)]

X is liable to the penalty that would have applied if the crime had been committed in Zimbabwe.

Person in Zimbabwe conspiring with or inciting person outside Zimbabwe [s 71(2)]

Any person who, in Zimbabwe, conspires with or incites another person to do anything outside Zimbabwe to, with or against a young or mentally incompetent adult person which, if it were done in Zimbabwe, would constitute the crime of rape, aggravated indecent assault, indecent assault, sexual intercourse or performing an indecent act with a young person or sodomy, shall be guilty of conspiracy or incitement to commit the appropriate crime.

Conspiracy or incitement outside Zimbabwe to commit in Zimbabwe sexual crimes against young or mentally incompetent persons

[s 72]

This re-enacts s 6 of the Sexual Offences Act.

It provides for the converse of the situation described in s 71.

Ingredients [s 72(1)]

X outside Zimbabwe conspires with or incites another person to commit any of the following crimes against a young or mentally incompetent person in Zimbabwe–

- rape;
- aggravated indecent assault;
- indecent assault;
sexual intercourse or performing indecent act with young person;
- sodomy;
- an attempt, conspiracy or incitement to commit these crimes.

X is guilty of incitement or conspiracy to commit the crime incited or conspired, whether or not this crime is a crime in the county in which the alleged incitement or conspiracy took place.

**Penalty [s 72(1)]**

X is liable to the same penalty that would have applied if the incitement or conspiracy had taken place in Zimbabwe.

---

**Sodomy [s 73]**

This section deals with the crime of sodomy, and combines the common law crimes of sodomy (that is, the performance of anal sexual intercourse between consenting male persons) and “offences against nature” (any other consensual physical contact of a sexual nature between male persons).

**Case**

In *S v Banana* 2000 (1) ZLR 607 (S) the Supreme Court held, by a majority, that the common law crime of sodomy is not unconstitutional on the grounds of discrimination.

On the other hand, in South Africa the crime of sodomy has been abolished. In the case of *National Coalition for Gays and Lesbian Equality and Another v Minister of Justice & Others* [1998] ZACC 15, 1999 (1) SA 6, 1998 (12) BCLR 1517 basing its decision on the Bill of Rights in the South African Constitution – and in particular its explicit prohibition of discrimination on the grounds of sexual orientation – the South African Constitutional Court unanimously ruled that the common law crime of sodomy, as well as various other related provisions of the criminal law, were unconstitutional and therefore invalid. In the case of *Minister of Home Affairs and Others* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) the South African Constitutional Court handed down a judgment that that led to the legalisation of same sex marriages by the passing of the Civil Marriage Act, 2006.

In Africa, homosexuality is illegal for homosexual men in 29 countries and for lesbian women in 20 countries.

**Between consenting adult males [s 73(1)]**

The crime is committed by both males who, on a consensual basis, knowingly perform the following acts with one another–

- anal sexual intercourse;
any act involving physical contact other than anal sexual intercourse, that would be regarded by a reasonable person to be an indecent act, such as masturbation of one male by another.

**Between male and boy below 14 or with mentally incompetent person**

A male person as anal sexual intercourse or engages in other sexual conduct with a boy of or below the age of 14 or with a mentally incompetent adult male and there is evidence that the boy or mentally incompetent person was capable of consenting and did consent to the sexual conduct.

Here only the first mentioned male person will be charged with sodomy.

**Penalty** [s 73(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Case**

In *S v Roffey* 1991 (2) ZLR 47 (H) the appellant pleaded guilty to one count of sodomy. He was sentenced to a period of ten months’ imprisonment with labour, of which four months was suspended on appropriate conditions. The evidence was that the complainant was both an adult and a willing party. No force or coercion had been used to persuade the complainant to submit to the appellant’s desires. The complainant had apparently committed similar acts in the past.

The court held that these factors make this case less serious than others of its genre. Accordingly, that the imposition of a fine was appropriate in the circumstances.

Not, however, that the Criminal Law Code now provides that a term of imprisonment for up to a year can be imposed for this offence.

**Between an adult male and a young male person** [s 73(3)]

This clarifies what crimes an adult male commits if he has sexual intercourse with or performs an indecent act upon male children under 12 and children between 12 and 16.

<table>
<thead>
<tr>
<th>Age of boy</th>
<th>Whether consent</th>
<th>Crime</th>
</tr>
</thead>
<tbody>
<tr>
<td>Below the age of 12</td>
<td>Boy deemed incapable of giving consent</td>
<td>Aggravated indecent assault or indecent assault</td>
</tr>
<tr>
<td>Of or above the age of 12-16</td>
<td>Boy has not consented</td>
<td>Aggravated indecent assault or indecent assault</td>
</tr>
<tr>
<td>12-16</td>
<td>Boy has consented</td>
<td>Performing indecent act with young person.</td>
</tr>
</tbody>
</table>
Boys under 14 and mentally incompetent persons not chargeable with sodomy [s 64(4)]

Where a male adult has anal intercourse with a boy of or below the age of 14, but of or above 12 years, or a mentally incompetent male person, and the evidence shows that the boy or mentally incompetent person was capable of consenting to anal sexual intercourse or other sexual conduct and did give such consent, the male adult alone will be charged with sodomy.

Competent verdicts [s 275 read with 4th Schedule]

- Indecent assault;
- Any crime of which a person might be convicted if he or she were charged with indecent assault.

Bestiality

[s 74]

This section codifies the common law crime of bestiality.

Ingredients

This crime is committed by anyone who knowingly commits any sexual act with an animal or a bird.

The person charged can be either male or female and the animal can be either male or female.

Penalty

\[
\begin{array}{|c|c|c|}
\hline
\text{Fine} & \text{Prison} & \text{Both} \\
\hline
\text{Up to level 14} & \text{Up to 1 year} & \text{Both} \\
\hline
\end{array}
\]

See Guide pp 72 & 186.

Sexual intercourse within a prohibited degree of relationship (formerly called Incest)

[s 75]

The common law of incest covered only “western” notions relating to sexual intercourse within prohibited degrees of relationship. It did not encompass customary concepts of “incest”. This is unfair. Thus in the Code this crime now encompasses not only common law notions of incest (with some modifications) but also customary law notions of “incest”.

Because customary and common law concepts of “incest” do not coincide in every particular (being in some cases wider, in others narrower, than each other), this crime has been re-labelled “sexual intercourse within a prohibited degree of relationship”. One example where there is a difference between the common law and customary law is that under common law first or second
cousins do not fall within the prohibited degrees of relationship whereas under customary law it usually does.

**Ingredients**

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X and Y who are related within the prohibited degrees of relationship have sexual intercourse</td>
<td>Either or both parties know or realise that there is a real risk that they are related within the prohibited degrees of relationship</td>
</tr>
</tbody>
</table>

Either or both X and Y will be guilty of this crime.

The prohibited degrees of relationship are set out in the table below.

<table>
<thead>
<tr>
<th>Relation</th>
<th>Relation</th>
<th>Further aspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parent</td>
<td>Natural child</td>
<td>This applies whether born in or out of wedlock</td>
</tr>
<tr>
<td>Adopting parent</td>
<td>Adopted child</td>
<td>This applies whether or not child was under 18</td>
</tr>
<tr>
<td>Step-parent</td>
<td>Step-child</td>
<td>This applies whether marriage between natural parent and step-parent under the Marriage Act or the Customary Marriages Act or unregistered customary law marriage; This applies whether or not the child was over 18 at time of the marriage.</td>
</tr>
<tr>
<td>Grand-parent</td>
<td>Grand-child (the child of one’s child)</td>
<td></td>
</tr>
<tr>
<td>Brother</td>
<td>Sister</td>
<td>Whether of whole or half blood.</td>
</tr>
<tr>
<td>Uncle</td>
<td>Niece (brother’s or sister’s daughter)</td>
<td></td>
</tr>
<tr>
<td>Aunt</td>
<td>Nephew (brother’s or sister’s son)</td>
<td></td>
</tr>
<tr>
<td>Grand-uncle</td>
<td>Grand-niece (nephew’s or niece’s daughter)</td>
<td></td>
</tr>
<tr>
<td>Grand-aunt</td>
<td>Grand-nephew (nephew or niece’s son)</td>
<td></td>
</tr>
<tr>
<td>Ascendant</td>
<td>Descendant</td>
<td>In any degree</td>
</tr>
<tr>
<td>Person</td>
<td>Descendant of person’s brother or sister</td>
<td>This applies whether brother or sister is of whole or half blood</td>
</tr>
<tr>
<td>Person</td>
<td>First cousin (child or)</td>
<td>The following are the defences to charge arising</td>
</tr>
</tbody>
</table>

The following are the defences to charge arising.
any descendant of child of uncle or aunt of such person)  
Second cousin (child or any descendant of child of great-uncle or great-aunt of such person)

<table>
<thead>
<tr>
<th>Out of sexual intercourse between first or second cousins [s 75(3) and (4)]–</th>
</tr>
</thead>
<tbody>
<tr>
<td>If X not member of community governed by customary law</td>
</tr>
</tbody>
</table>

It is a defence for X to prove that cultural or religious customs or traditions of his or her community don’t prohibit marriage between first or second cousins (in other words, that the customary law of that community doesn’t prohibit the relationship.)

In determining this issue court must have regard to the evidence of any person who, in its opinion, is suitably qualified by reason of his or her knowledge to give evidence as to the cultural or religious customs or traditions of the community concerned.

But complications could arise in a situation like that which follows. Two cousins who appear to belong to a community governed by customary law because they are Africans become Muslims and purport to marry, or have sexual relations with each other. They will still be guilty of this crime unless they can show that they do not, in fact, belong to a community governed by customary law or they belong to a customary law community that permits marriage between cousins.

If X member of community governed by customary law

It is a defence for X to prove that cultural or religious customs or traditions of the particular community to which he or she belongs don’t prohibit marriage between first or second cousins.

In determining this issue court must have regard to the evidence of any person who, in its opinion, is suitably qualified by reason of his or her knowledge to give evidence as to the cultural or
religious customs or traditions of the community concerned.

In determining whether or not a person is a member of a community governed by customary law the court must have regard to all the circumstances of the person’s life, including—

- whether or not the natural parents of the person were married under the Customary Marriages Act or were parties to an unregistered customary law marriage;
- whether or not the person lives among other members of such a community and is regarded by such other members as belonging to that community, notwithstanding that the person’s natural parents were not married to each other, or were married exclusively under the Marriage Act;
- where the person does not live among members of such a community, whether he or she has ties to such a community by reason of his or her natural parents belonging to such a community.

This provision will not apply to persons who—

- on the date of commencement of this Code are married to each other under the Marriage Act or the Customary Marriages Act or are parties to an unregistered customary law marriage; or
- on or after the date of commencement of this Code are married to each other under any foreign law.

[s 75(5)(b)]

| Person | Ascendant or descendant of person’s spouse or former spouse | This applies whether married under Marriage Act, Customary Marriages Act or parties to unregistered customary law marriage. |

Penalty
<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent charges** [s 75(5)]

<table>
<thead>
<tr>
<th>Conduct</th>
<th>Correct charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>A male has non-consensual sexual intercourse with a female to whom he is related within the prohibited degrees of relationship</td>
<td>Rape</td>
</tr>
<tr>
<td>A female has non-consensual sexual intercourse with man to whom she is related within prohibited degrees of relationship</td>
<td>Aggravated indecent assault</td>
</tr>
</tbody>
</table>

**Competent verdicts** [s 275 read with 4th Schedule]

- Indecent assault;
- Sexual intercourse or performing an indecent act with a young person;
- Any crime of which a person might be convicted if charged with any of the crimes above.

**Complicity in sexual crimes**  
[s 76]

If X knowingly permits the commission upon his or her premises of -

- rape;
- aggravated indecent assault;
- indecent assault;
- sexual intercourse or performing indecent acts with a young person;
- sexual crimes with a young person or mentally incompetent person outside Zimbabwe;
- sodomy;
- bestiality;
- sexual intercourse within the prohibited degree of relationship.

or

If X detains a person with the intention that another person will commit one of these crimes upon the detained person
X may be charged with being an accomplice or accessory to the commission of the crime concerned, or with kidnapping, or both.

---

**Public indecency**

[s 77]

This re-enacts and expands upon the crime of public indecency contained in s 3(a), (n) and (p) of the Miscellaneous Offences Act.

**Ingredients** [s 77(1)]

X engages in conduct which he or she knows will be seen or heard by another or realises that there is a real risk of this happening. The prohibited forms of conduct are these—

- X indecently exposes himself or herself or engages in other indecent conduct which causes offence to another in or near a public place, or in or near a private place within the view of such other person; or
- X, knowing or realising that there is a real risk that he or she will be heard, utters or makes use of indecent or obscene language in or near a public place, or in or near a private place within the hearing of another person;
- X, knowing or realising that there is a real risk that he or she will be heard, sings any indecent or obscene song in or near a public place, or in or near a private place within the hearing of another person;
- X knowing or realising that there is a real risk that the writing or drawing will be seen, writes or draws any indecent or obscene word, figure or representation in or near a public place, or in or near a private place within the hearing of another person.

**Seriousness** [s 77(2)]

This provides that the court must not convict a person of this crime unless the words or conduct in question are sufficiently serious to warrant punishment. In deciding this, the court must take into account all relevant factors including the following—

- the nature of the words or conduct;
- the extent to which the words were repeated or the conduct was persisted in, as the case may be;
- the age and gender of the person who heard the words or witnessed the conduct;
- any previous relationship between the parties;
- the degree of offence caused to the person who heard the words or witnessed the conduct.

**Penalty** [s 77(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 9</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>
Deliberate transmission of STD other than HIV

[s 78]  
This re-enacts s 51 of the Public Health Act.  
It deals with the crime of deliberately transmitting a sexually-transmitted disease other than HIV. It includes the transmission of STDs like syphilis, gonorrhea and herpes. 

Ingredients [s 78(2)]  
Either a male or a female can commit this crime. 
X knows that he or she is infected with an STD or realises that there is a real risk of this and X
  ➢ intentionally infects Y with the STD; or 
  ➢ does anything or causes or permits anything to be done with the intention of infecting Y or realising that there is a real risk that Y will be infected.

Presumption [s 78(3)]  
If the prosecution proves that X was suffering from an STD at the time of the crime, it is presumed, unless the contrary is proven, that X knew he or she was infected with the STD or realised the real risk that he or she was infected.

Defences [s 78(4)]  
It is a defence for X to prove that Y, knowing that X had an STD, consented to the act in question appreciating the nature of the STD and the possibility of becoming infected with it. 

Penalty [s 78(2)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

---

Deliberate transmission of HIV

[s 79]  
Ingredients [s 79(1)]  
Either a male or a female can commit this crime. 
This crime is committed if X knows that he or she is infected with HIV or realises that there is a real risk of this and X
  ➢ intentionally does anything or permits the doing of anything which X knows will infect Y; or 
  ➢ does anything which X realises involves a real risk of infecting Y. 

The act can be a sexual act or it can be some other act like a drug addict who knows he or she has HIV stabbing another with a needle contaminated with his or her HIV.
(The offence as worded does not seem to cover a situation where X, a nurse who is not himself infected with HIV, stabs Y with a needle contaminated with the HIV of a patient. If it does not cover this situation, the nurse would have to be charged with assault.)

Defences [s 78(4)]

It is a defence for X to prove that Y, knowing that X had HIV, consented to the act in question appreciating the nature of HIV and the possibility of becoming infected with it.

Penalty [s 78(2)]

Imprisonment for up to 20 years.

Comment

In this situation we have a person who knows he or she is HIV positive. Knowing of his or her condition and knowing that if he or she has unprotected vaginal or anal sexual intercourse this will be likely to infect another, the person goes ahead and has sexual intercourse. Alternatively, a person deliberately plunges a needle into another which he or she knows to be contaminated with HIV.

In Zimbabwe when the new law is passed this person will be guilty of a criminal offence for which she or he can be imprisoned for up to twenty years. As the offence is formulated it does not have to be proven that the person actually infected the sexual partner with HIV. It is enough that the person did an act that was likely to lead to the sexual partner becoming infected. It is a defence to this crime that the sexual partner knew the accused was infected with HIV and consented to the act knowing the nature of HIV and the possibility of becoming infected with it by the act.

The first problem with using this crime as a deterrent is that this offence will be very difficult to prove and very few convictions are likely to ensue. This will dilute any deterrent impact.

In terms of the proposed provisions in Zimbabwe, when the alleged offender appears in court for the first time in connection with the offence, the court can order that the person be tested for HIV. A positive test result will help with the proof of the offence, but does not overcome other difficulties such as proving that the accused person was HIV positive at the time of the alleged offence. Even more problematical for the State will be to prove that the accused person knew he was infected at the time when he or she had unprotected sex. In most cases the accused will deny this. Even if that person has undergone a test prior to the offence and been told about the results, the State will encounter problems in proving this. In Zimbabwe HIV infection is not a notifiable disease in terms of our Public Health legislation and testing institutions are under no obligation to reveal such information to the authorities - indeed currently it would be both illegal and a breach of medical confidentiality for the testing institutions to reveal a patient’s HIV status without the patient’s express consent.

Another problem with this offence is that the victim is not entirely blameless. The victim has agreed to have unprotected sexual intercourse with the offender. Given the prevalence of HIV this
is a silly thing to do, even if the offender gave the partner a categorical assurance that he or she was not infected with HIV. On the other hand, if the victim agreed to have unprotected sex knowing that the partner was infected with HIV, then the crime is not committed.

Nonetheless many would still argue that in the few cases which can be proven it is appropriate to impose stern punishments to send a message to others in the society that such behaviour will not be tolerated, especially in cases where the State is able to establish that an uninfected person was infected as a result of the accused person’s irresponsibility. The incarceration of such offenders will also prevent them from infecting other persons, at least those outside prison.

Again, however, there are reasons to believe that the successful prosecution of some will have little deterrent effect on the others. The category of offenders at which this offence is aimed is an abnormal group, that is, a group of people who know that they have a fatal infection. They are often angry and resentful and may also be fatalistic in their outlook. They may blame previous sexual partners for infecting them and may act out this anger and resentment by seeking to pass on the infection to others. As they know that they have only a limited time left to live, they may be little influenced by a threat of lengthy incarceration. Even if a lengthy prison term is imposed upon them they will know that they will die well before the end of such sentences.

A final problem with this offence is that it may have the effect of driving the problem underground. Once the word gets around that if you know your HIV status as a result of being tested and that, if you continue to have unprotected sexual intercourse you could face serious criminal penalties, this might have the effect of discouraging people from being tested for HIV on a voluntary basis.

As regards transmission within marriage, some protection is afforded if infected spouses can be charged with deliberately spreading HIV to their marital partners. However, as stated above, this offence will be very difficult to prove.

Now that the Code has abolished the marital rape exemption in Zimbabwe, the law on rape will probably offer greater protection to a spouse. If a husband forces his wife to have unprotected sex with him, he can be charged with rape and the fact that he had HIV when he had the unprotected sex with his wife should be an aggravating factor for the purposes of sentence. Here it would not have to be proven that the husband or wife actually knew that he or she was infected with HIV.

In some ways a more constructive way of addressing this problem would be to assist the infected persons to claim compensation from the culprits. This remedy would only be effectual where the culprits have reasonable financial means to pay compensation, but where they do have such resources the victims should be able to claim substantial damages and this may be a greater deterrent than a remote threat of incarceration. Another advantage of civil proceedings is that a lower standard of proof applies in such cases by comparison with criminal proceedings and so it would be easier to prove the case.
Mandatory prison sentence where person committing sexual crime infected with HIV

[s 80]

Mandatory sentence [s 80(1)]
This provides for a mandatory prison sentence of at least 10 years imprisonment to be imposed upon a person who was infected with HIV when he or she commits certain sexual crimes. The crimes concerned are
- rape;
- aggravated indecent assault;
- indecent assault;
- sexual intercourse with a young person;
- an indecent act with a young person involving penetration of the body which involves a risk of transmission of HIV.

If a person convicted of these crimes any of these crimes satisfies the court that there are special circumstances peculiar to the case, which circumstances must be recorded by the court, why the penalty provided under this subsection should not be imposed, the convicted person will be liable to the penalty provided for rape provided in s 65, the penalty for aggravated indecent assault provided in s 66 or the penalty for sexual intercourse or performing indecent acts with young persons provided for in 70, as the case may be.

A proviso to this subsection has been added that, notwithstanding s 192, the increased penalty will not apply to incitement or conspiracy to commit these crimes and will only apply to an attempt to commit them if the attempt involved any penetration of any part of the body of the convicted person or of another person’s body that carries the risk of transmission of HIV.

Proof of infection [s 80(2)]
The presence in X’s body of antibodies or antigens detected through the appropriate test is prima facie proof that X is infected with HIV.

Presumption [s 80(3)]
If it is proved that X was infected with HIV within 30 days after committing the sexual crime, it is presumed, until the contrary is proved, that X was infected when he or she committed the crime.

Comment
In clear-cut cases few would argue that HIV-positive sexual offenders deserve to receive extremely severe sentences. A clear-cut case would be one like this. A man who, to his own knowledge is HIV positive, rapes a young girl who is a virgin and is not infected with HIV. The man knows that in raping the girl he is likely to pass on his infection to her. As a result of the rape the young girl is in fact infected with HIV. This man obviously deserves a very harsh sentence.
because not only has he brutalised and traumatised the girl but also he has cut short her life and sentenced her to die a painful death.

Unfortunately most of the cases are not as straightforward as this. In many cases it may be impossible to prove that the accused knew he was infected when he raped a woman. In many cases it may not be possible to establish that the accused was HIV positive at the time of the rape. In a case where the victim is a sexually active woman, if it can be established that the accused was HIV positive when he raped his victim, there will still be reasonable doubt as to whether the victim was infected by the accused or by some other sexual partner.

The lawmakers in Zimbabwe have tried to overcome some of these difficulties in these provisions but they have not succeeded in overcoming all of the difficulties. The provision lays down that the accused can be sentenced to not less than ten years in prison if it is proved that at the time of the offence he was infected with HIV, whether or not he was aware of his infection. In the way in which this is formulated the clear message to all rapists is that if you rape a woman and it turns out that you were HIV-infected when you did so, we will send you to prison for the rest of your life. Even if you did not know you were infected, you are highly culpable as you raped a woman when you were infected with HIV and you should have known that you might already be infected.

The major problem is to establish on a reliable basis that the rapist had HIV at the time of the rape. Again, hardly any accused persons will admit that they were infected when they perpetrated their rapes. The Zimbabwean legislation tries to overcome the difficulty of proving such infection by empowering the magistrate to order, when the accused first appears in court in connection with the offence, that the accused undergo an HIV test. If this test is positive, and provided that it is proved that the accused was infected with HIV within thirty days after the offence, it is presumed that he was infected when he committed the offence unless he proves otherwise. There are various practical problems arising out of this provision.

Firstly, the testing method is not infallible and can lead to false positive and false negative results. In the case of a false positive result a rapist who was not positive could end up being given a disproportionate sentence. In the case of a false negative result a rapist will avoid receiving the sentence he deserves.

Secondly, the tests that are commonly used do not detect the virus itself but discover the presence of the virus by establishing the presence of antibodies. However, when a person is infected with HIV it takes up to three or four months before antibodies are produced. This period during which there is infection but no production of antibodies is called the window phase. Thus if an accused has raped a woman soon after contracting the infection and the matter is brought to court speedily, when the court orders the accused person to be tested the accused could still be in the window period and there is thus a risk of a false negative result. On the other hand, the presumption that he was infected only applies if he tests positive within thirty days of the offence. It is usually pointless to order testing of an accused when more than thirty days have elapsed from the time when the offence was committed. It would now be too late to invoke the presumption
that he was positive at the time of the offence and to prove that he was at that time without the assistance of the presumption would be nigh impossible. Thus the accused may end up benefiting from delays in dealing with the case. For example, the accused may benefit if the complainant is slow to report the matter because of threats made by the accused against her or the accused has managed to evade arrest for some time or the police were slow to complete the docket.

There are also some problems that could arise from the compulsory testing of the accused for HIV before conviction. If the accused is acquitted of the charge then he will have been forced to undergo a test which he did not want to have, presumably without any attendant counselling. Secondly, if the magistrate is told that the accused is infected with HIV before he is convicted this could possibly prejudice the magistrate against the accused and make him more inclined to convict him.

In cases where these provisions can be successfully invoked and the accused are thus liable to sentences of not less than ten years in prison, again the question should be asked, will such sentences be likely to deter others? The answer again must be that it is very unlikely. Even without these provisions, sentences for rape have increased over the last few years and sentences of between 10 and 15 years are now common. This does not seem to have had very much deterrent effect as these crimes are increasing at a fairly rapid rate. To increase the sentence in cases where the rapist is HIV at the time of the offence will be unlikely to have much additional deterrent effect especially where the rapists are aware that they are HIV positive and that they will die within a few years.

Again, one remedy that is little used is that of claiming civil damages. In many cases this remedy is not practically worth pursuing as the offenders often have little in the way of financial assets. But where the rapist has financial means, the victim should be assisted in pursuing this remedy.

---

**Soliciting for purposes of prostitution**

[s 81]

This substantially re-enacts s 4 of Miscellaneous Offences Act.

**Ingredients** [s 81(1) as read with s 81(2)]

X commits this crime when she or he publicly solicits Y for the purposes of prostitution. The solicitation can be by–

- X soliciting Y in a public place or any place to which the public or any section of the public have access; or

- X soliciting for custom in a print or electronic medium that is sent to the public.

**Penalty** [s 81(2)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>
Living off or facilitating prostitution

[s 82]

This re-enacts with modifications s 9 of the Sexual Offences Act, which made it a crime for anyone to be a keeper of a brothel, or solicit persons for prostitution or other immoral purposes, or demand money from a prostitute in consideration for managing her “business”.

However, the general crime contained in that Act of “living on the earnings of prostitution” (as opposed to the specific crime of demanding money from a prostitute in consideration for facilitating his or her activities) has been omitted because it is considered to be too broad in its potential application.

Ingredients

X commits this crime if X does any of the following--

<table>
<thead>
<tr>
<th>keeps a brothel</th>
<th>demands from a prostitute any payment or reward in consideration for X</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>➢ keeping, managing or assisting in the keeping of a brothel in which the prostitute is, or has been, living for immoral purposes; or</td>
</tr>
<tr>
<td></td>
<td>➢ having solicited other persons for immoral purposes on behalf of the prostitute; or</td>
</tr>
<tr>
<td></td>
<td>➢ having effected the prostitute’s entry into a brothel for the purpose of prostitution; or</td>
</tr>
<tr>
<td></td>
<td>➢ having brought or assisted in bringing the prostitute into Zimbabwe for immoral purposes.</td>
</tr>
<tr>
<td></td>
<td>demands from a prostitute any payment or reward in consideration for any present or past immoral connection with the prostitute</td>
</tr>
</tbody>
</table>

Penalty

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 7</td>
<td>Up to 2 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
Competent verdict on this charge [s 275 as read with 4th Schedule]

- Soliciting;
- Procuring;
- Detaining a person for purpose of engaging in unlawful sexual conduct;
- Any crime of which a person might be convicted if charged with any of the crimes above.

----------

**Procuring**

[s 83]

This re-enacts with modifications s 11 of the Sexual Offences Act, which made it a crime to procure another person for the purposes of engaging in unlawful sexual conduct, to become a prostitute or to enter a brothel.

*Ingredients*

X commits this crime if X procures another person—

- for the purposes of engaging in unlawful sexual conduct with another person or with persons generally, whether inside or outside Zimbabwe; or
- to become a prostitute, whether inside or outside Zimbabwe; or
- to leave Zimbabwe with the intent that the other person may become a prostitute; or
- to leave his or her usual place of residence, not being a brothel, with the intent that he or she may become an inmate of or frequent a brothel elsewhere.

*Penalty*

The procurement for sexual purposes of a young person under 16 will attract a more severe penalty than the procurement of an older person.

The fine for this crime is up to level 14

The term of imprisonment is as follows—

<table>
<thead>
<tr>
<th>Where person procured is young person</th>
<th>If person procured not young person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 10 years</td>
<td>Up to 2 years</td>
</tr>
</tbody>
</table>

----------

**Using threats or drugs to induce sexual conduct**

[s 84]

This re-enacts s 12 of the Sexual Offences Act, which made it a crime to threaten a person or administer a drug or substance to a person in order to induce that person to engage in any sexual conduct.

*Ingredients*
X commits this crime if X does the following acts to enable X or someone else to engage in unlawful sexual conduct with another person—

- threatens or intimidates that other person; or
- applies or administers any intoxicating drug, liquor, matter or thing to that other person; or
- causes that other person to take any intoxicating drug, liquor, matter or thing.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

When rape or other sexual crime should be charged

If X actually engages in the sexual conduct, having induced the complainant to engage in the conduct by threatening or drugging that person, X should be charged with rape or whatever other specific sexual crime has been committed and not merely with inducing the conduct by threat or by administering drugs.

**Detaining person for purpose of engaging in unlawful sexual conduct**

[s 85]

This re-enacts s 10 of the Sexual Offences Act, which made it a crime to detain persons against their will in a brothel or in another place for the purposes of engaging in unlawful sexual conduct.

**Ingredients**

- X detains another person against his or her will in a brothel or any other premises whatsoever;
- with the intention that the person detained should engage in unlawful sexual conduct with himself or herself or another person or with persons generally.

**Kidnapping**

Nothing in this section precludes a person from being charged with or convicted of kidnapping or unlawful detention if the facts support such a charge or conviction.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 6</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>
Permitting young person resort to place for purpose of engaging in unlawful sexual conduct

[s 86]

This re-enacts s 7 of the Sexual Offences Act, which made it a crime for an owner or occupier of a place to permit young persons to resort to the place for the purpose of engaging in unlawful sexual conduct.

**Ingredients [s 86(1)]**

The owner of a place knowingly induces or allows a young person to enter or be in the place for the purpose of engaging in unlawful sexual conduct with another person or with other persons generally.

**Defence [s 86(2)]**

It is a defence to this charge for X to prove that he or she had reasonable cause to believe that the young person was of or over the age of sixteen years.

But the apparent physical maturity of the young person concerned will not, on its own, constitute reasonable cause for the purposes of this crime.

**Penalty [s 86(1)]**

<table>
<thead>
<tr>
<th>Age of person detained</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 12</td>
<td>Fine up to level 11</td>
</tr>
<tr>
<td></td>
<td>Prison up to 10 years</td>
</tr>
<tr>
<td></td>
<td>Both.</td>
</tr>
<tr>
<td>Over 12</td>
<td>Fine up to level 10</td>
</tr>
<tr>
<td></td>
<td>Prison up to 7 years.</td>
</tr>
<tr>
<td></td>
<td>Both.</td>
</tr>
</tbody>
</table>

**Competent verdicts [s 275 as read with 4th Schedule]**

- Living off or facilitating prostitution;
- Detaining person for purpose of engaging in unlawful sexual conduct;
- Any crime of which a person might be convicted if charged with any of the crimes above.

Allowing child to become prostitute

[s 87]

This crime of allowing a child to become a prostitute is taken from s 8 of the Children’s Act (formerly the “Children’s Protection and Adoption Act”).

**Ingredients**

A parent or guardian
➢ causes or allows his or her child under the age of 18
➢ to associate with prostitutes or to be employed by any prostitute as a prostitute or to reside in a brothel.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
Crimes Involving Bodily Injury

Sections 88 to 91 deal with crimes involving bodily injury.

Definitions [s 88]

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
</table>
| assault                   | ➢ any act by a person involving the application of force, directly or indirectly, to the body of another person, whereby bodily harm is caused to that other person; or  
                           | ➢ any act by a person that causes, directly or indirectly, the injection into or application to the body of another person of any substance without that person’s consent; or  
                           | ➢ any act by a person that causes any substance to be consumed by another person without that person’s consent.                                                                                           |
| bodily harm               | any harm causing pain or discomfort to the body, or any impairment of the body or its functions, whether temporary or permanent.                                                                                 |

Assault [s 89]

Under the common law there were two separate crimes of common assault and assault with intent to do grievous bodily harm. It was often very difficult to decide whether the assault in question constituted only common assault or whether it amounted to the more serious crime of assault with intent to do grievous bodily harm. There was much discussion in the case law about how to draw the distinction between the two crimes but the borderline between the two crimes remained problematic.

Section 89 abolishes the distinction between “common assault” and “assault with intent to inflict grievous bodily harm” and substitutes the single crime of assault. The seriousness of the assault will in future be a matter for sentence. In sentencing an offender for assault the court must have regard to certain factors which may aggravate the assault, such as the age of the person assaulted, the degree of force or violence used and whether or not X intended to inflict serious bodily harm. (Another factor not specifically mentioned, but which could be encompassed by the general provision allowing the court to take into account any other relevant consideration, is that serious injuries were actually inflicted.)

The crime of assault will continue to be able to be committed by a threat of assault. As read with the definition of the term “assault” in s 88, it also encompasses threats of assault which inspire a reasonable fear in the person threatened that he or she will suffer violence, and the deliberate administration of substances to another person without that person’s consent.

Ingredients [s 89(1)]
<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X commits an assault upon Y.</td>
<td>X does this—</td>
</tr>
<tr>
<td>By words or gestures, X threatens to assault Y.</td>
<td>X does this</td>
</tr>
</tbody>
</table>

*Lack of ability to effect assault no defence to assault by threat* [s 89(2)]

It is no defence to a charge of assault constituted by a threat of assault that, at the time the fear or belief is inspired, the person who inspired such fear or belief lacked the ability to effect his or her purpose.

*Administration of noxious substance* [s 88]

Administration of a noxious substance causing harm will no longer be a separate offence but will simply be treated as a species of assault. The definition of assault in s 88 includes “any act by a person that causes any substance to be consumed by another person without that person’s consent.”

*Factors in sentencing* [s 89(3)]

The court must look at all relevant considerations including the following—

- the age and physical condition of the person assaulted;
- the degree of force or violence used in the assault;
- whether or not any weapon was used to commit the assault;
- whether or not the person carrying out the assault intended to inflict serious bodily harm;
- whether or not the person carrying out the assault was in a position of authority over the person assaulted;
- in a case where the act constituting the assault was intended to cause any substance to be consumed by another person, the possibility that third persons might be harmed thereby, and whether such persons were so harmed.

*Penalty* [s 89(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
Competent verdicts [s 275 read with 4th Schedule]

- Negligently causing serious bodily harm;
- Disorderly conduct in public place;
- Possessing a dangerous weapon;
- Dealing in or possession of prohibited knives.
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

**Negligent assault**

[s 90]

This section creates the new crime of “negligently causing serious bodily harm”. The negligent infliction of death is already punishable under our law as culpable homicide.

It was felt that similarly the negligent infliction of serious bodily injury should also be punishable. This crime expresses society’s interest in upholding the physical safety of its members. Additionally at the end of a successful prosecution for this crime it would be possible for the court to award compensation to the victim in terms of Part XIX of the Criminal Procedure and Evidence Act. If the court can award compensation at the end of a successful prosecution of this crime, this would avoid the need for victims to bring separate civil actions for compensation, something that indigent (poor) victims will often be unable to do because of the expense of mounting such actions.

**Ingredients**

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X causes serious bodily harm to another person by any act whatsoever</td>
<td>X negligently fails to realise that serious bodily harm may result from his or her conduct or negligently fails to guard against that possibility.</td>
</tr>
</tbody>
</table>

**Comment**

The courts will have to decide when bodily harm is serious for the purposes of this crime.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
Assault of person other than the intended victim

This section deals with the situation in which X attacks Y intending to assault him or her but the blow misses or is deflected and ends up injuring Z.

<table>
<thead>
<tr>
<th>Liability in relation to intended victim (Y)</th>
<th>Liability in relation to actual victim (Z)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault or attempted assault, whichever is appropriate in the circumstances.</td>
<td>Assault if he or she realised that there was a real risk or possibility that bodily harm might be caused to that person; or Negligently causing serious bodily harm if he or she did not intend to cause that person such injury and did not realise that there was a real risk or possibility that such injury might be caused to that person, but was negligent in failing to realise it.</td>
</tr>
</tbody>
</table>

Depending upon the state of mind of X in relation to Z, X can be charged with assault, attempted assault or negligently causing serious bodily harm in respect of the harm X causes to Z.

In *S v Ncube* 1983 (2) ZLR 111 (S) X aimed a blow with a spear at his uncle, intending to injure him grievously, but X’s brother tried to intervene and placed his body in the way and the brother accidentally received the blow aimed at the uncle with the blow hitting him in the face. As regards the injury to the brother, X was found not guilty of assault with intent to do grievous bodily harm as the State had failed to prove that X foresaw that his brother would intrude and be struck instead of his uncle. X was therefore not guilty of assault with intent to do grievous bodily harm in respect of the injury to his brother but guilty of attempted assault with intent to grievous bodily harm in respect of his intended assault upon his uncle. (In terms of the Code X would have been guilty of negligent assault for wounding his brother and attempted assault (or assault by threatening gesture) in respect of his uncle.

In *S v Raisa* 1979 (4) SA 541 (O) X tried to stab a mother who warded off the blow by putting her child in front of her as a result of which the child was stabbed. The court held that X was not liable for assault with intent to do grievous bodily harm in respect of the child because he did not have the required intention to injure the child. (In Zimbabwe under the Code X probably would have been guilty of negligent assault in respect of the child.)
Crimes Involving Infringement of Liberty, Dignity, Privacy or Reputation of Individual

Sections 92 to 96 deal with crimes involving the infringement of the liberty, dignity, privacy or reputation of an individual.

Kidnapping or unlawful detention

[s 93]

This provides for the crime of kidnapping or unlawful detention, which combines the existing common law offences of plagium and abduction. For clarity, a distinction is made between cases where an adult or a child is kidnapped.

Rather confusingly this crime is given the double title of kidnapping or unlawful detention when in fact “unlawful detention” has in the past simply been treated as a sub-species of kidnapping. In this commentary on this crime the crime will simply be referred to as kidnapping.

Kidnapping of adult

[s 93(1)]

**Ingredients** [s 93(1)(a)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X deprives an adult of freedom of bodily movement</td>
<td>X intends to do so or realises that there is a real risk of doing do.</td>
</tr>
</tbody>
</table>

**Irrelevant factors** [s 93(2)]

X may be convicted of this crime

- whatever the manner in which X deprived the adult of his or her freedom of bodily movement, whether by the use of force or threats or force or by the use of fraudulent misrepresentation or otherwise;
- whatever the duration of the deprivation of freedom of movement (that is the period of deprivation can short).

**Penalty** [s 93(1)]

Imprisonment for life or any shorter period.

**Competent verdict** [s 275 as read with 4th Schedule]

- Kidnapping or unlawful detention of a child.
Kidnapping of child (person under age of 18)

Ingredients [s 93(1)(b)]
This crime can only be committed by a person other than the lawful custodian of the child. It is committed—

- if X deprives a child of freedom of bodily movement intending to do so or realising that there is a real risk of doing do; or
- X detains or keeps a child, intending to deprive the child’s lawful custodian of his or her control over the child or realising that there is a real risk of doing do.

Irrelevant factors [s 93(2)]
X may be convicted of this crime—

- whatever the manner in which X deprived the child of his or her freedom of bodily movement or the lawful custodian of his or her control, whether by the use of force or threats or force or by the use of fraudulent misrepresentation or otherwise;
- whatever the duration of the deprivation of freedom of movement (that is, the period of deprivation can short).

Mitigatory factor [s 93(b)]
It is a mitigating factor to this species of kidnapping that the accused is a parent of or closely related to the child and the kidnapping was not accompanied by violence or the threat of violence.

Competent verdict [s 275 as read with 4th Schedule]

- Kidnapping or unlawful detention of an adult.

Child Abduction Act

As regards the procedure for dealing with children abducted in other countries and brought to Zimbabwe, see the Child Abduction Act.

Penalty [s 93(1)]

Imprisonment for life or any shorter period.

However, where a non-custodial parent kidnaps his or her child from the custodial parent or the kidnapping of the child is carried out by a close relative, and such kidnapping is not accompanied by violence or the threat of violence, the penalty is a fine up to level 7, prison for up to 2 years or both.

Aggravating circumstances [s 93(3)(a)]

The court may take into account in aggravation such factors as—
that the kidnapping was accompanied or motivated by the demand of a ransom for the safe return of the person kidnapped;

that the kidnapping was accompanied by violence or threats of violence.

Cases
In *R v Long* 1970 RLR 1; 1970 (2) SA 153 (RA) X enticed a young girl away for 14 hours. The court held that the shortness of the duration of the kidnapping was irrelevant. X was found guilty of kidnapping. (See casenote on this case in 1970 (1) Rhodesia Law Journal 15.)

In *S v Mahuni & Ors* HH-406-88 a police constable, C, remonstrated with Xs for urinating in a public place. The Xs who were bus employees forcibly took constable on their bus and drove some distance to police station where left C. In the course of the journey threatened Xs had threatened to assault C and throw him in a river. They were found guilty of kidnapping.

In *S v Masuka & Anor* 1989 (3) ZLR 33 (S) X gave a lift to some schoolgirls and made advances towards them. He carried them past their school (the agreed stopping place) towards communal lands. The girls threw themselves off the speeding truck. The court found X guilty. It found that there had been a substantial interference with personal liberty of the girls. It held that a seizure of a person with evil intent without his or her consent, however transient, is an interference with his personal liberty.

In *S v Dzimuri & Ors* 1997 (2) ZLR 27 (H) the questions of the length of time during which the victim was deprived of his liberty and the Xs’ intent were considered. Smith J held that the length of time for which a person is deprived of his liberty or removed from his parental control is immaterial. The only relevance it may have, apart from affecting sentence, is in distinguishing kidnapping from cases of assault involving only a transient and incidental seizure of a person for a short period, that is, where the principle of *de minimis non curat lex* (triviality) applies. In such cases, the court should have regard to Xs “evil intent”. If the “evil intent” was in order to extort a ransom or other benefit, a very short period would suffice. If there were no such “evil intent”, a longer period would be necessary. In this case, there was no evidence of how long it took for the driver to go the extra 20 km, though it would not have taken him long. But Xs had not carried off the driver or seized the bus with any “evil intent”. Their reasons for making the driver take them to Chereya were unclear. Consequently, the convictions for kidnapping should be set aside.

Gillespie J held that the use by Macdonald JA in *R v Long* of the term “evil intent” was not meant to elevate whatever varying motive there may be for the offence into an additional requirement of the necessary element of intention. It was rather an intimation that, although one may be unable in any particular case to ascertain an intention to deprive a person of his liberty for more than a short period of time, an offence will nevertheless be disclosed where the alleged wrong is committed in circumstances (which include consideration of the motive behind the restraint upon the victim) which ought in principle to be regarded as subject to penal sanction.

The application of the *de minimis* principle is a value judgment. Crimes affect the interests of the community as a whole, not merely those of the individual complainant. If the harm done is very
trifling, the community is not really affected. In determining the application of the principle, the judicial officer is entrusted with a policy decision to be exercised according to all the relevant circumstances of the case. In the case of a charge of kidnapping, where all the circumstances, including the short period of time involved or the absence of any ulterior motive, are such that it might be considered as a matter of policy that the wrongdoing ought not to attract conviction as kidnapping, then an acquittal should follow.

---

**Pledging a female person**

[s 94]

As well as re-enacting and combining the crimes contained in sections 11 and 15 of the Customary Marriages Act, this section also includes a prohibition of the customary (or allegedly customary) practice of handing over of a female person to settle a debt or delict.

**Ingredients**

A lawful custodian or relative of a female—

- when she is under 18 or without her consent, hands her over to another person as compensation for the death of a relative of that other person, or as compensation for any debt or obligation or without her consent; or
- when she is under 18 or without her consent, enters into an arrangement whereby the female is promised in marriage to any man, whether for any consideration or not; or
- by force or intimidation compels or attempts to compel a female to enter into a marriage against her will, whether as compensation or pursuant to a promise of marriage.

**Accomplice** [s 94(2)]

Any party to such a compensation arrangement or marriage promise may be charged as an accomplice to pledging a female person.

If the person to whom the girl is handed over has sexual intercourse with the female without her consent, he would be guilty of rape or if he has sexual intercourse with her with her consent and she is under 16 he would be guilty of unlawful sexual intercourse with a young person in contravention of s 70 of the Code.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Up to 2 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Criminal insult**

[s 95]
The crime of “criminal insult” (presently called by the Latin name of crimen injuria) in punishes the infringement of the dignity or the privacy of individuals.

**Ingredients [s 95(1)]**

The crime is committed when X–

- by words or conduct;
- seriously impairs Y’s dignity or seriously invades Y’s privacy;
- intending to do so or realising the real possibility that the words or conduct will have this effect.

In the case of *S v Majuru* S-121-90, a headmaster at a school, was convicted of four counts of criminal injuria. The complainants were four female pupils at the school aged 11 and 12. X had been in the habit of visiting the girls’ dormitory at night time before they went to bed. The State had alleged that on such visits X had engaged in activities that amounted to the crime of criminal injuria. On appeal the convictions on all of the four counts were set aside as the record showed that the State had failed to prove that there had been an intentional impairment of dignity of a serious nature.

**Seriousness requirement [s 95(2)]**

So as to avoid the cluttering up of the courts with trivial cases of criminal insult this crime is only committed where X seriously impairs dignity or seriously invades privacy. In deciding whether X’s insult or invasion of the privacy of Y was sufficiently serious to constitute the crime, the court must take into account all relevant factors including the following–

- nature of X’s words or conduct;
- whether X repeated words or persisted in conduct;
- age and sex of Y;
- any previous relationship between X and Y;
- the degree of offence caused to Y.

See *S v Dongonda* HH-73-88. X had written insulting words on a cell wall about a policeman. The court said the test of seriousness is whether the interests of the State or the community will be detrimentally affected? Having regard to all the circumstances of this case — the words were written in the privacy of a police cell and directed at a policeman by an accused person — the injuria did not meet the test of seriousness.

**Impairment of dignity – must Y feel insulted or degraded? [s 95(3)]**

Where the charge is based on impairment of dignity, the State must usually prove that Y felt insulted or degraded. However, proof that Y felt insulted or degraded is not necessary where–

- Y is a child [as defined in s 92 this means a person under the age of 18];
- Y is a mentally disordered or intellectually handicapped person as defined in the Mental Health Act;
- Y is a person who through physical disability is unable to hear the insulting words or see the insulting conduct.

In Mpofu 1975 (1) RLR 362 (G) the court said that although this crime can be committed against young children, the State must prove intent on part of X to impair the dignity of child.

*Invasion of privacy – must Y be aware of invasion? [s 95(4)]*

Where X invades Y’s privacy and observes Y in a state of undress, it is unnecessary to prove that Y was aware of the invasion of his or her privacy when it took place. If Y only became aware of what had happened later, however, the State must prove that Y did feel insulted or degraded when he or she learned about X’s conduct.

See *S v Nhamoinesu* S-56-95.

*Defence to charge based on invasion of privacy [s 95(5)]*

X has a defence where he or she invades the privacy of his or her spouse (Y) in order to obtain evidence of the adultery of Y. The defence also applies to a licensed private investigator engaged by X to obtain evidence of the adultery of Y.

The requirements for this defence are as follows—

- the intrusion must have been motivated solely by the desire to obtain evidence of the commission of adultery by Y;
- there must be reasonable grounds for believing that X was not invading the privacy of innocent persons;
- the extent of invasion of privacy was not more than was reasonably necessary to obtain evidence of the adultery.

See *S v Israel & Anor* 1975 (2) RLR 191 (A).

*All persons entitled to protection of dignity [s 95(7)]*

This everyone is entitled to the protection of his or her dignity by the law and no one is devoid of dignity whatever his or her occupation or mode of life. This means that prostitutes, homosexuals and “vagrants”, previously considered under the classical Roman-Dutch law not to possess dignity and therefore not to be entitled to legal protection, are no longer denied the protection of the law in this respect.

*Penalty*

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine</td>
<td>Prison</td>
<td>Both</td>
</tr>
<tr>
<td>Up to level 6</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>
Criminal defamation

[s 96]

This codifies the common law crime of “criminal defamation”.

Ingredients [s 96(1)]

X commits this crime if–

- X publishes a statement which causes serious harm to the reputation of that other person or creates a real risk or possibility of causing such serious harm;
- intending to harm the reputation of another person; and
- knowing that when he or she published the statement it was false in a material particular or realising that there was a real risk or possibility that it might be.

Seriousness of defamation [s 96(2)]

There is a non-exhaustive list of factors that a court must take into account in deciding whether the publication of a statement is sufficiently serious to constitute this crime. The factors are–

- the extent to which X has persisted with the allegations;
- the extravagance of allegations;
- the nature and extent of publication of the statement;
- whether and to what extent the interests of the State or any community have been detrimentally affected by the publication.

Presumption [s 96(4)]

If the prosecution proves that the defamatory statement was made known to any person, it will be presumed unless the contrary is proved that the person understood its defamatory significance.

Defences [s 96(3)]

X is entitled to raise the same defences to criminal defamation as are applicable in a case of civil defamation. These defences are justification (truth and public benefit), fair comment and privilege.

Penalty [s 96(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Up to 2 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Comment

This crime can be used as a weapon by senior politicians and other prominent persons to suppress criticism of their actions. It therefore carries the risk of being used to oppress opponents of government. The crime imposes a severe restrain on freedom of speech.
Burchell *Principles of Criminal Law* (Juta 2010) maintain that “prosecution for defamation has an unacceptable potential to inhibit freedom of expression and media freedom.” He goes on to say; “A strong case for decriminalising defamation has been made by many writers and the case for abolition is even stronger in the light of the constitutional imperatives of freedom of expression.”

It is arguable that in Zimbabwe this crime violates that constitutional guarantee of freedom of expression and that it should be abolished and everyone, no matter how important or prominent, should be restricted to protecting their reputations by suing for damages under civil law.

**Cases**

In *R v Chikerema* 1958 R&N 516; 1959 (1) SA 721 (FS) X accused a Government Minister of being a thief at a political meeting. The allegation was serious and X was found guilty.

In *S v Murangarire* 1977 (2) RLR 73 (GS); 1977 (4) SA 237 X had made a false claim that he had been assaulted during the course of being arrested. This allegation was not serious and he was found not guilty.

In *S v Modus Publications & Anor* 1996 (2) ZLR 553 (S) a newspaper published stories alleging that the President of Zimbabwe had married a woman at a secret ceremony and that a named judge had conducted this ceremony and that a named Minister had been a witness at the ceremony. These false allegations were serious and the editor and owner of the paper were found guilty.

**Defamation of group of persons**

In *S v Wilson & Ors* HH-114-04 it was alleged that a newspaper had defamed the Executive Committee of the Constitutional Commission of Inquiry by publishing an article that implied the draft constitution had been printed without taking into account the general populace’s views extracted during the constitutional review process. No evidence was led to show that the Commission was a body corporate or *universitas* that was independent from its members and had succession.

The court held that for the Executive Committee to be defamed reference must have been to its named or ascertained member or members. The defamatory matter must not just refer to the Executive Committee itself without reference to a certain definite person or definite persons who are its members. As the Committee came into existence only after the original draft was allegedly printed, the defamatory words were written about an unnamed entity comprising anonymous individuals.

See *Guide* pp 79-80 and 189-190.
Witchcraft, Witch-finding and Related Crimes

Sections 97 to 102 replace the provisions of the Witchcraft Suppression Act and reform the criminal law on this subject.

A clear distinction is now made between the practices of “witchcraft” and “witch-finding”. It was felt that witch-finding should not be stigmatised as “witchcraft”, but it was also recognised that the practice of witch-finding may in some cases be socially disruptive or lead to injustice or harm to the person accused of witchcraft.

Engaging in practices commonly associated with witchcraft

[§ 98]

Ingredients [§ 98(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X engages in a practice commonly associated with witchcraft and such practice inspires in the other person a real fear or belief that harm will occur to him or her or any member of his or her family</td>
<td>X engages in these practices with intent to cause harm to another</td>
</tr>
</tbody>
</table>

Words alone cannot amount to practice [§ 98(2)]

For this crime spoken or written words alone will not constitute a practice commonly associated with witchcraft, unless the words are accompanied by or used in connection with other conduct commonly associated with witchcraft.

Judicial notice of witchcraft practice not permissible [§ 98(3)]

A court itself may not take judicial notice of any practice that is said to be commonly associated with witchcraft.

Expert testimony on witchcraft practice [§ 98(4)]

The court can call evidence about whether a practice is commonly associated with witchcraft generally or in the particular area where the practice took place.

The court can call to give such evidence a witness any person who, in court’s opinion, is suitably qualified to give such evidence on account of his or her knowledge.

Accomplices [§ 98(3)]

Any person aiding or abetting the commission of this crime can be charged as an accomplice to the crime.

Penalty [§ 98(1)]

130
Section 6 of the Witchcraft Suppression Act punished the mere profession of witch-finding. The crime in the Code of indicating a witch or wizard does not make X criminally liable if X simply accuses another of engaging in witchcraft practices. X is not liable for this crime, if having reasonable grounds for suspecting the other is engaging in such practices, X makes his or her accusation without the purported use of non-natural means.

Ingredients [s 99(1)]

This crime is committed if-

- X groundlessly accuses someone of being a witch or wizard;
- X by the purported use of non-natural means accuses someone of witchcraft.

To “accuse a person of witchcraft” means that the person accused has used or is likely or able to use non-natural means to cause-

- another death, injury or disease or disability; or
- destruction, loss or damage to property.

or

is possessed by a spirit which has caused, is causing or is likely or able to cause-

- another death, injury, disease or disability; or
- destruction, loss or damage to property.

[s 97]

Section 97 defines “non-natural means” as including the practice of witch-finding.

Penalty [s 99(1)]

<table>
<thead>
<tr>
<th>Case of any purported use of any non-natural means</th>
<th>Any other case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine up to level 10</td>
<td>Fine up to level 6</td>
</tr>
<tr>
<td>Imprisonment for up to 5 years</td>
<td>Imprisonment for up to 1 year</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>

Competent verdict [s 275 as read with 4th Schedule]

- Using non- natural means to resolve crimes or delicts
Employing non-natural means to resolve crime or delict

[s 100]

Ingredients [s 100(1)]

X commits this crime if—

- X by the purported use non-natural means, intentionally indicates Y as the perpetrator of a crime or delict; or
- X in the purported investigation by non-natural means of a crime or delict, requires, advises or incites Y to undergo any test or to consume any substance.

Accomplice [s 100(2)]

X will be an accomplice to this crime if he or she procures the services of another to commit this crime.

Unavailable defence [s 100(3)]

It is not a defence that the person indicated actually perpetrated a crime or delict, but this can be mitigatory. [Also under s 99(3)]

Penalty [s 100(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Belief in witchcraft not defence to murder or assault

[s 101]

This restates the common law rule that a genuine belief in witchcraft does not excuse, but may mitigate, a criminal charge of murdering or assaulting someone believed to be a witch.

See cases such as: S v Franshisko & Ors 1977 (2) RLR 37 (GS); S v Bitoni & Anor S-98-87 and S v Muleya & Ors S-69-88.

See also “Sentencing persons who kill witches” by G. Feltoe 1990 Vol 2 No 1 Legal Forum pp 36-40.

Alternate or concurrent charges

[s 102]

This provides for charges alternative to or concurrent with those specified under ss 98 to 100.
<table>
<thead>
<tr>
<th>Charge</th>
<th>Alternative charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engaging in practice commonly associated with witchcraft, indicating witch or wizard, employing non-natural means to resolve crime or delict, involving conduct that is in itself otherwise unlawful</td>
<td>X may be charged with crime constituted by that conduct if punishment to which the person is liable for that crime is the same or less than that provided for under section 98, 99 or 100</td>
</tr>
<tr>
<td></td>
<td>X shall be charged with crime constituted by that conduct, whether or not concurrently with the crime of engaging in a practice commonly associated with witchcraft, indicating a witch or wizard or employing non-natural means to resolve a crime or delict, if punishment to which the person is liable for that crime is greater than that provided for under section 98, 99 or 100.</td>
</tr>
</tbody>
</table>

### Bigamy

Sections 103 and 104 provide for the crime of bigamy. The crime is committed in relation to monogamous marriages only, that is, marriages celebrated under the terms of the Marriage Act or other monogamous marriages celebrated inside or outside Zimbabwe.

Under the monogamous system a person may only marry one wife. Under the polygamous system a person can marry more than one wife. Under Zimbabwean law most Zimbabweans are entitled to enter into either a monogamous or a polygamous union. However, the system of polygamy is incompatible with the system of monogamy and the two systems cannot be intermingled. Thus if X is married to Y under the polygamous system X is entitled to marry Z under the system of polygamy. However, X cannot marry Y under the monogamous system without first dissolving his polygamous marriage to Z. So too if X is married to Y under the monogamous system he may only enter into a polygamous marriage with Z after first dissolving his marriage to Y according to the laws relating to monogamy.

*Ingredients [s 104(1)]*

<table>
<thead>
<tr>
<th>Monogamous marriage</th>
<th>Actually polygamous marriage</th>
<th>Potentially polygamous marriage</th>
</tr>
</thead>
</table>
X is married to Y in a monogamous marriage
X knowing that marriage to Y still subsists
intentionally purports to enter into another marriage, whether monogamous or polygamous, with Z.

“monogamous marriage” means—
- marriage celebrated in terms of the Marriage Act or
any other marriage celebrated inside or outside Zimbabwe under a law which prohibits the parties from marrying anyone else whilst they remain married to each other.

X is married to Y in an actually polygamous marriage
X, knowing that marriage to Y still subsists ;
X intentionally purports to enter into a monogamous marriage with Z.

“actually polygamous marriage” means a polygamous marriage consisting of a husband and two or more wives.

X is married to Y in a potentially polygamous union
X knowing that marriage to Y still subsists,
intentionally purports to enter into a monogamous marriage with Z.

“potentially polygamous marriage” means a polygamous marriage consisting of a husband and a single wife.

“polygamous marriage” means—
- a marriage celebrated according to customary law and solemnised in terms of the Customary Marriages Act ; or
- an unregistered customary law marriage.

In respect of an unregistered customary law unions, where X denies that he is a party to such a union the onus is on the State to prove the existence of such a union beyond a reasonable doubt. [s 104(2)]

**Penalty [s 104(1)]**

*Monogamous marriage followed by purported monogamous marriage*

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 6</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>

*Polygamous or potentially polygamous marriage followed by purported monogamous marriage*

Fine up to level 5.

See *Guide* pp 73-74 and 186.
Concealment of Births and Exposure of Infants

Concealment of birth

[s 105-s107]

These sections replace and expand upon the provisions of the Concealment of Birth Act, which this Code repeals in its entirety and codify the common law crime of exposing an infant.

Ingredients [s 106(1)]

X buries, abandons or disposes of the body of a child

with the intention of concealing the fact of its birth, whether the child was still-born or died during or after its birth,

X may be convicted of this crime even though it has not been proved that the child died before its body was buried, abandoned or disposed of.

Presumptions [s 107]

<table>
<thead>
<tr>
<th>Fact proven by prosecution</th>
<th>Presumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecution proves that X buried, abandoned or disposed of body of child otherwise than in accordance with the provisions of the Burial and Cremation Act</td>
<td>Presumed, unless the contrary is proved, that X buried, abandoned or disposed of the body with the intention of concealing the fact of its birth</td>
</tr>
<tr>
<td>Prosecution proves that X buried, abandoned or disposed of any human remains</td>
<td>Presumed, unless the contrary is proved, that X buried, abandoned or disposed of the body of a child.</td>
</tr>
</tbody>
</table>

Penalty [s 106(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 7</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>

Cases

In S v Jasi 1993 (2) ZLR 451 (H) the court ruled that a “child” means a foetus which has reached a stage of development which makes it capable of being born alive, irrespective of duration of pregnancy.
In *S v Maramba* 1994 (1) ZLR 326 (H) a woman had a spontaneous abortion and had discarded the foetus. There was no evidence as to the age of the foetus or whether foetus was a “child” for purposes of Act.

---

**Exposing an infant**

[s 108]

This provides for common law crime called “exposing an infant”. This crime has rarely been prosecuted in the past, but it is specifically mentioned (together with concealment of birth) in s 213 of the Criminal Procedure and Evidence Act (in the context of an alternative verdict for culpable homicide or murder where the victim is a recently born child).

Arguably, this common law crime has been impliedly repealed by section 7 (1) of the Children’s Act, but it is uncertain whether a common law crime can be repealed without express provision to that effect. Moreover, that section is limited to parents or guardians, whereas the common law offence applies to anyone who exposes an infant.

**Ingredients** [s 108(1)]

X intentionally abandons an infant in such a place or in such circumstances that death may result from the exposure.

**Concurrent and alternate charges** [s 108(2)]

<table>
<thead>
<tr>
<th>Child dies as result of abandonment</th>
<th>Child does not die as result of abandonment</th>
</tr>
</thead>
<tbody>
<tr>
<td>X will be charged with murder or attempted murder or infanticide or attempted infanticide, whether or not concurrently with the charge of exposing an infant. (The alternative charge of “attempted infanticide” may not be appropriate in every case where an infant is exposed by its mother, because frequently the mother is motivated not by a wish to kill the child, but by a hope that the child will be found by someone and reared by that person. The stigma of “infanticide” should therefore not attach to a mother in those circumstances.)</td>
<td>X may be charged concurrently or alternatively under s 7(1) of Children’s Act.</td>
</tr>
</tbody>
</table>

**Factors in sentencing** [s 108(3)]

In the case of a mother exposing her child, the court must have regard to any pressure or stress from which she suffered arising out of any one or more of the following circumstances or considerations—

- the effects which the birth had, or which she believed it would have, on her social, financial or marital situation;
➢ the difficulties which were created, or which she believed would be created, in caring for the infant in the social, financial or marital situation in which the infant was born;
➢ the difficulties which she had, or which she believed she would have, in caring for the infant due to her inexperience or incapacity;
➢ any other relevant circumstance or consideration.

**Penalty** [s 108(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
Crimes in Relation to Graves and Corpses

Violation of graves

[s 110]

This supplements s 26 of the Cemeteries Act and is of somewhat wider scope.

Ingredients

X violates a grave in which human remains are situated,

knowing that he or she is doing so or realising that there is a real risk or possibility that he or she may be doing so.

“grave” includes any monument, vault or tombstone, whether situated in a cemetery established in terms of the Cemeteries Act or not;

“violate” a grave includes to destroy or damage the grave or the immediate surrounds of the grave, or take any article from the grave.

Penalty

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 7</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>

Violation of corpses

[s 111]

This codifies the existing common law crime.

However, dealing with human remains will not be held to be unlawful if this is done pursuant to certain enactments, such as the Inquests Act and the Anatomical Donations and Post-mortem Examinations Act.

Ingredients [s 111(1)]

Any person who damages, mutilates, removes pieces from or otherwise violates a dead human body, knowing that he or she is doing so or realising that there is a real risk or possibility that he or she may be doing so,

Lawful activities [s 111(2)]

This crime is not committed and it is lawful for a person

- to remove tissue from or carry out a post-mortem examination on or otherwise deal with a dead human body in accordance with the Inquests Act, the Anatomical Donations and Post-mortem Examinations Act, or any other enactment; or

- to do anything necessary for the purpose of embalming a dead human body or preparing it for burial, cremation or other lawful disposal.

Penalty [s 111(1)]
<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to or exceeding level 14</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
Property Crimes

Theft and Related Crimes

Sections 112 to 129 are concerned with theft, robbery and related crimes.

Theft

[s 113]

This codifies, with modification, the common law crime of theft.

It also abolishes the existing crime of “theft by false pretences”, treating it instead as a species of fraud. Included within the scope of this crime is the theft of money or other property held in trust.

Ingredients [s 113(1)]

X commits theft if—

- X takes property capable of being stolen; and
- X knows that another is entitled to own, possess or control the property or realises that there is a real risk or possibility of this; and
- X intends to deprive the other permanently of his or her ownership, possession or control, or realises that there is a real risk or possibility of this.

Taking [s 112]

For the purposes of theft X can take property —

- if X takes possession or control of a movable corporeal thing or object;
- if X, who has in his or her possession a movable corporeal thing or object, assumes the rights of an owner over that thing or object;
- if X exercises or assumes title to the right to any incorporeal right vested in another.

Presumption of intention to deprive permanently [s 115]

Unauthorised borrowing of property does not constitute theft, although it is now a separate offence in terms of the Code (see s 116). However, a person charged with theft is presumed to have had the intention to deprive someone permanently of the property in question if—

- after taking possession or assuming control of the property
  - X abandons it without regard to whether or not it is restored to the person who owned, possessed or controlled it;
  - X subjects it to a use which he or she realises will destroy it;
- X consumes the property, intending to return identical property;
- X spends money intending to return the same amount.
## Property that can and cannot be stolen [s 112]

<table>
<thead>
<tr>
<th>Property that can be stolen</th>
<th>Property that cannot be stolen</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ a movable corporeal thing or object;</td>
<td>➢ property common to everyone, such as water in a public stream or air in the atmosphere;</td>
</tr>
<tr>
<td>➢ any incorporeal right vested in a person relating to movable or immovable property.</td>
<td>➢ wild animals, birds, insects and fish not reduced to captivity;</td>
</tr>
<tr>
<td>This includes—</td>
<td>➢ eggs, honey and other produce of wild animals, birds, insects and fish not taken into someone’s possession;</td>
</tr>
<tr>
<td>➢ <strong>money</strong></td>
<td>➢ property that has been finally and absolutely abandoned by its owner, that is, thrown away or otherwise disposed of by the owner with the intention of relinquishing all his or her rights to it.</td>
</tr>
<tr>
<td>whether in the form of cash, specific notes or coins, an entry in an account or other abstract sum of money or claim to be paid an amount of money;</td>
<td></td>
</tr>
<tr>
<td>➢ <strong>shares</strong> in a business undertaking;</td>
<td></td>
</tr>
<tr>
<td>➢ electricity or electromagnetic waves from telecommunications or broadcasting system -when illegally tapped or diverted from their intended destination.</td>
<td></td>
</tr>
</tbody>
</table>

### Competent verdicts [s 275 as read with 4th Schedule]

- Unauthorised borrowing or use of property;
- Making off without payment;
- Receiving stolen property knowing it to have been stolen;
- Malicious damage to property;
- Any crime of which a person might be convicted if charged with any of the crimes above.

### Jurisdiction

Theft is a continuing offence. Thus if a theft has been committed outside Zimbabwe and the thief brings the proceeds of the theft into Zimbabwe, the accused can be prosecuted in Zimbabwe. See S v A 1979 RLR 69(G) at 74A-D.

See *Guide* pp 124-126 and 237-243
Theft of trust property

[s 113(2)]

This type of theft deviates in certain respects from the general law of theft; for example, it may be committed by a deliberate failure to account for the property or to hand it over to another person without an actual “taking” of the property. Certain specific defences also apply to charges of theft of trust property.

What constitutes trust property [s 112]

<table>
<thead>
<tr>
<th>What is trust property</th>
<th>What is not trust property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following—</td>
<td>Property received on terms expressly or impliedly stipulating that—</td>
</tr>
<tr>
<td>➢ hold the property on behalf of another or account for it to another; or</td>
<td>➢ the recipient is entitled to use the property as his or her own;</td>
</tr>
<tr>
<td>➢ hand the property over to a specific person; or</td>
<td>➢ there would only be a debtor and creditor relationship between the parties.</td>
</tr>
<tr>
<td>➢ deal with the property in a particular way.</td>
<td></td>
</tr>
</tbody>
</table>

Ingredients [s 113(2)]

X commits this crime if

➢ X holds trust property; and

➢ in breach of the terms under which it is so held, X intentionally—

• omits to account or accounts incorrectly for the property;

• hands the property or part of it over to a person other than the person to whom X is obliged to hand it over;

• uses the property or part of it for purposes other than purpose for which X is obliged to use it; or

• converts the property or part of it to his or her own use.

When X not guilty of theft of trust property [s 113(3)]

X will not be guilty if

• X properly and transparently accounted for the property in accordance with the terms of the trust; or

• When X disposed of the property X retained the equivalent value of the property for delivery to the person entitled thereto, unless the terms under which he or she holds or receives the property require him or her to hold and deliver back the specific property.
Using misrepresentation to take property [s 113(4)]

X must be charged with fraud and not theft if X uses a fraudulent misrepresentation to take property capable of being stolen.

**Penalty [s 113(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14 or twice the value of the stolen property, whichever is the greater</td>
<td>Up to 25 years, provided that a court may suspend the whole or part of the prison sentence on condition that X restores the property to Y or compensates Y for its loss.</td>
<td>Both</td>
</tr>
</tbody>
</table>

See *Guide* pp 124-125.

**Stock theft**

[s 114]

This creates the new crime of “stock theft” (the existing crime commonly called “stock theft” is simply the common law crime of theft, with specific reference to the theft of livestock). This new crime is a composite one encompassing the theft of livestock or its produce, receiving livestock or its produce knowing it to have been stolen, and the unlawful possession or acquisition of livestock in the circumstances presently set out in sections 5 and 6 of the Stock Theft Act.

**Definitions [s 114(1)]**

<table>
<thead>
<tr>
<th>Livestock</th>
<th>Produce</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bovine or equine animal (cows and horses)</td>
<td>Includes the whole or any part of any skin, hide, horn or egg of livestock or any wool or mohair.</td>
</tr>
<tr>
<td>Sheep, goat, pig, poultry, ostrich, pigeon, rabbit</td>
<td></td>
</tr>
<tr>
<td>Any domesticated game</td>
<td></td>
</tr>
<tr>
<td>Carcases or portion of carcass of such animals or birds</td>
<td></td>
</tr>
</tbody>
</table>

**Ingredients [s 114(2)]**

Taking livestock or produce

X is guilty if X takes livestock or produce—

- knowing that another is entitled to own, possess or control the property or realising that there is a real risk or possibility of this; and
- intending to deprive the other permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility of this.

*Taking possession of stolen livestock or produce*

X is guilty if X takes possession of stolen livestock or its produce—
- knowing that it has been stolen; or
- realising that there is a real risk or possibility that it has been stolen.

*Found in possession or having been in possession of livestock or produce*

X is guilty if X is—
- found in possession of, or has been in possession of the property
- in circumstances which give rise, either at the time of the possession or at any time thereafter, to a reasonable suspicion that at the time of such possession the property was stolen, and who is unable at any time to give a satisfactory explanation of his or her possession.

*Acquiring or receiving stolen livestock or produce*

X is guilty if—
- X acquires or receives into his or her possession from another any stolen livestock or produce
- without reasonable cause (the proof whereof lies on him or her) for believing at the time of acquiring or receiving such livestock or produce that it was the property of the person from whom he or she acquired or received it or that such person was duly authorized by the owner thereof to deal with it or dispose of it.

*Attempted stock theft*

X is guilty of attempted stock theft if X—
- enters any cattle kraal, stable, byre, fold, pen, sty, loft, coop, run, building or other enclosure;
- with intent to steal any livestock or its produce therefrom

*Shifting of onus [s 114(6)]*

If X is accused of attempted stock theft on the basis that X entered a cattle kraal, stable, byre, fold, pen, sty, loft, coop, run, building or other enclosure with intent to steal any livestock or its produce therefrom, the onus will be on X to prove, on a balance of probabilities, that he or she had no intention of stealing any livestock or its produce.

*Alternate charge [s 114(7)]*

<table>
<thead>
<tr>
<th>Charge</th>
<th>Alternate charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taking livestock or produce</td>
<td>Theft or receiving stolen property knowing it to have been stolen, if such a conviction is the more appropriate on the evidence.</td>
</tr>
<tr>
<td>Taking possession of stolen livestock or produce</td>
<td></td>
</tr>
</tbody>
</table>
Found in possession or having been in possession of livestock or produce
Acquiring or receiving stolen livestock or produce

<table>
<thead>
<tr>
<th>Type of conduct</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taking bovine or equine animal or taking possession of stolen bovine or equine</td>
<td>Mandatory prison sentence of 9 - 25 years unless X satisfies the court that there are special circumstances peculiar to the case, which circumstances must be recorded by the court</td>
</tr>
<tr>
<td>animal</td>
<td>If the court sentences to minimum period of 9 years court may not suspend of whole or part of the sentence [s 114(4)(a)]</td>
</tr>
<tr>
<td>Acts in relation to bovine or equine animal other than taking or taking possession of stolen bovine or equine animal</td>
<td>Fine up to level 14 or twice the value of stolen property, whichever is the greater; Prison up to 25 years Both.</td>
</tr>
<tr>
<td>Acts not involving bovine or equine animal</td>
<td>Both.</td>
</tr>
<tr>
<td>Attempted stock theft by entering enclosure etc with intent to steal livestock or</td>
<td>Fine up to level 12 Prison up to 2 years Both.</td>
</tr>
<tr>
<td>produce</td>
<td></td>
</tr>
</tbody>
</table>

**Unauthorised borrowing**

[s 116]

This creates the new crime of “unauthorised borrowing or use of property”. Under the common law, such borrowing did not constitute theft because for theft it was necessary to prove that the
person intended to deprive someone permanently of the property. Under the existing statute law, only the unauthorised borrowing of cars (section 57 of the Road Traffic Act) and boats (section 10 of the Miscellaneous Offences Act) is punishable.

**Ingredients**

X commits this crime if—

- knowing that another person is entitled to own, possess or control any property capable of being stolen or realising that there is a real risk or possibility of this; and
- takes possession or control of any property capable of being stolen without the consent of that other person, and
- intending to temporarily hold or make temporary use of it and then return it to that other person’s possession or control

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14 or up to twice value of property, whichever is greater</td>
<td>Up to 2 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts** [s 275 as read with 4th Schedule]

- Getting on to or interfering with or driving or riding a vehicle in contravention of s 57 of the Road Traffic Act;
- Taking or retaining hold of or boarding a vehicle or trailer in contravention of s 58 of the Road Traffic Act.

---

**Making off without payment**

[s 117]

This provides for the new crime of “making off without payment” in order to cover situations where “services” rather than “goods” are “stolen”. Also within the scope of this crime is the consumption of goods for which payment after consumption is required but has not been made: in these circumstances the intention to “deprive another person permanently” of ownership, possession or control is incapable of proof, because it may only have been formed after the goods were consumed and therefore no longer capable of being owned, possessed or controlled by anybody.

**Ingredients** [s 117(2)]

X commits this crime if—

- X benefits from a service or consumes goods lawfully provided to him or her; and
X intentionally makes off without paying for the services or goods.

Payment on the spot includes—

- where a service is provided, payment at the time of collecting goods on which work has been done or in respect of which a service has been provided;
- payment before leaving the premises where the service or goods were provided.

**Penalty [s 117(2)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 7 or up to twice value of service or goods, whichever is the greater</td>
<td>Up to 2 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Presumption of intention to make off without paying [s 117(3)]**

<table>
<thead>
<tr>
<th>Facts proven by prosecution</th>
<th>Presumption</th>
</tr>
</thead>
</table>
| X, having benefited from a service or consumed any goods lawfully provided to him or her, absented himself or herself without paying for the service or goods; and that the service or goods are of a kind for which payment on the spot is ordinarily required. | It will be presumed, unless the contrary is proved, that—
  - X knew that payment on the spot for the service or goods was required or expected from him or her; and
  - X intentionally made off without paying for the service or goods. |

**Competent verdicts [s 275 as read with 4th Schedule]**

- Theft;
- Unauthorised borrowing or use of property;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

**Special defences to theft, stock theft or unauthorised borrowing [s 118]**

As well as the general defences that apply to all crimes, certain special defences that can be raised to a charge of theft, stock theft or unauthorised borrowing or use are set out in this section.

**Mistaken belief that owner consented [s 118(1)(a)]**
It is a defence to these charges if X took the property genuinely but mistakenly believing that the owner of the property, or the person entitled to possess or control it, had consented to the taking or would have consented if he or she had known of the circumstances.

*Mistaken belief that was own property [s 118(1)(b)]*

It is a defence to these charges if X took the property genuinely but mistakenly believing that the property was his or her own property and no other person was entitled to possess or control it.

See *S v Mutonga* S-71-83 in which X had a claim of ownership over the goods.

*Mistaken belief that property abandoned [s 118(1)(c)]*

It is a defence to these charges if X took the property genuinely but mistakenly believing that the property had been finally and absolutely abandoned, that is, that the owner had thrown it away or otherwise disposed of it intending to relinquish all his or her rights to it.

But this defence will only apply if—

- the belief was reasonable given the nature and value of the property and the circumstances of its finding; or
- X took all reasonable steps to find the owner of the property and reported his or her finding of it to the police or other appropriate authority.

In *S v Randen & Anor* 1980 RLR 473 (A) the court stated that claim of right is only a defence if X genuinely believed property abandoned by owner or lost by the owner and circumstances are such as to reasonably lead X to believe that the owner is unascertainable.

In *R v Clarke & Anor* 1976 (1) PH H 108 (R) Xs took parts from tractor which had rolled down embankment. They genuinely but unreasonably believed that tractor had been abandoned. They were found not guilty of theft because they genuinely thought that tractor had been abandoned. It should be noted that under the Code provision the Xs would have been found guilty as their belief that the property had been abandoned was unreasonable.

*Where defence will not apply [s 118(3)]*

Where X takes possession or control of the property with the mistaken consent or acquiescence of Y, consent will not be a defence to a charge of theft, stock theft or unlawful borrowing or use of the property if X—

- knows of the mistake at the time that X takes the property;
- deals with or uses or keeps the property after X has become aware of the mistake.

There are other types of claim of right cases that are not dealt with under these provisions. See, for instance—

*S v Tamayi & Ors* 1982 (1) ZLR 267 (S) in which the Xs had taken cattle belonging to another because they thought that the family of that person had had something to do with the death of their relative. They took the cattle as compensation. They were found not guilty because of claim of right.
S v Musarurwa HH-212-84 in which X had taken money from employer’s store where she worked because her employer had withheld her wages. She thought she was entitled to take the money. She was acquitted on the basis of claim of right.

S v Mahanzu HB-108-88 in which X borrowed his employer’s property.

S v Muzuzu A-67-80 in which X had taken property from a burnt out store after being told to do so by a police officer.

S v Chihanya 1981 ZLR 381 (G) in which X thought he was entitled to take the things.

See also S v Mudimu A-120-80.

On the defence of claim of right generally as it relates to property crimes it is important to note the provisions of s 237 of the Code. With this defence X asserts that he or she believed he or she had a right to do or omit to do any thing. An example would be if X is accused of theft and he or she says that he or she genuinely believed that he or she was the owner of the property in question. If the entitlement to the property forms an essential ingredient of the crime (as it does in cases of theft) this defence will avail an accused if he or she genuinely believed that he or she was entitled to the property but was factually mistaken.

Section 237 provides that if X raises the defence of claim of right in relation to a property crime, this defence can only succeed if the mistake arises from mistake or ignorance of fact. If the belief arose–

- solely from mistake or ignorance of an essential fact, the defence will succeed;
- solely from mistake or ignorance of law, then the defence will be treated as the defence of ignorance of the law and it will not succeed unless it falls within the exception to the rule that ignorance of the law is no excuse;
- partly from mistake or ignorance of law and partly from mistake or ignorance of fact, the belief will be treated as arising from mistake or ignorance of law and it will not succeed unless it falls within the exception to the rule that ignorance of the law is no excuse.

In the light of the above, the case of S v Banet 1973 (1) RLR 335 (A); 1973 (4) SA 430 (RA) would be differently decided under this Code provision. In that case X was found not guilty of theft by conversion. He had made personal use of money given for business expenses for entertainment. He genuinely thought he was allowed to use the money for personal purposes provided that he replaced it. In effect the mistake was a mistake of the law, as X was mistakenly believed that the law allowed him to make personal use of the money given to him for expenses provided that he later replaced the money. [The decision in this case is criticised in the case of S v Johnson 1977(4) SA 116 (RA) at 123H-124C. It is suggested in the Johnson case that the mistake in the Banet case was naked ignorance of the law]. The same also seems to apply to the case of S v Latham 1979 RLR 458 (A); 1980 (1) SA 723 (ZA). Here X was found not guilty of theft. He had genuinely but unreasonably believed that he could replace the Government horse with one from own stable. Here again this was essentially a mistake as to the law. See also R v Ellis 1961 R&N 468 (FS).

See Guide pp 27 and 143-146.

149
### Unavailable defences to theft, stock theft and unauthorised borrowing

**Unavailable defences s 119(1) and (2)**

<table>
<thead>
<tr>
<th>Charges</th>
<th>Defences not available to these charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theft, stock theft or unauthorised borrowing or use of property</td>
<td>That X took the property concerned in circumstances other than those provided for in 118 (1) genuinely but mistakenly believing that he or she—</td>
</tr>
<tr>
<td></td>
<td>➢ had a legal right to take the property on his or her own behalf or on behalf of someone else;</td>
</tr>
<tr>
<td></td>
<td>➢ did not intend to gain any personal benefit from the property concerned;</td>
</tr>
<tr>
<td></td>
<td>➢ needed the property concerned because he or she was suffering hardship;</td>
</tr>
<tr>
<td></td>
<td>➢ believed that the person entitled to own, possess or control the property had more property than he or she needed for his or her own purposes;</td>
</tr>
<tr>
<td></td>
<td>➢ did not intend to prejudice the person entitled to own, possess or control the property;</td>
</tr>
<tr>
<td></td>
<td>➢ did not know the identity of the person entitled to own, possess or control the property.</td>
</tr>
<tr>
<td>Theft, stock theft or unlawful borrowing or use of the property</td>
<td>In respect of trust property that it is not a defence that X genuinely but mistakenly believed that he or she was allowed to consume or dispose of the property (provided that he or she replaced the property), unless there is an express provision in the agreement allowing this.</td>
</tr>
<tr>
<td></td>
<td>This provision would seem to eliminate the defence that the accused successfully pleaded in the case of S v Banet 1973 (1) RLR 355 (A) as the money given to the salesman was trust money because it was specified that it only be used for expenses in connection with the business trip.</td>
</tr>
<tr>
<td>Theft or stock theft</td>
<td>If X originally took the property with the intention of permanently depriving the person entitled to own, possess or control, that X intended to return the property.</td>
</tr>
</tbody>
</table>
Theft and stock theft continuing crimes

Previously the law on theft provided that a person continues to commit the crime of theft for as long as the stolen property remains in the possession of the thief. This rule meant that if X steals property in an area falling outside the territorial jurisdiction of the court he or she can nonetheless be tried for theft by that court if he or she is found in possession of the stolen property within the court’s jurisdiction.

The new rule [s 121(1)]
This drastically widens this rule by providing that the crime of theft or stock theft continues to be committed by a thief even if the thief subsequently loses possession of the property he or she has stolen.

*Place where thief may be tried [s 121(2)(a)]*

Regardless of whether a thief remains in possession of the property he or she has stolen, that person may be tried for theft or stock theft by any court within whose area of jurisdiction he or she possessed the stolen property, even if he or she originally stole the property outside the court’s area of jurisdiction or outside Zimbabwe.

*Accomplice [s 121(2)(b)]*

Any person who assists the thief while he or she is in possession of the stolen property may be charged and convicted as an accomplice to theft or stock theft.

---

**Temporary acquisition as security or pledge**

[s 122(1)]

*Taking possession of property capable of being stolen as security or pledge [s 122(1)]*

<table>
<thead>
<tr>
<th>Physical elements</th>
<th>Mental element</th>
</tr>
</thead>
<tbody>
<tr>
<td>X takes possession or control of property capable of being stolen which is owned, possessed or controlled by Y.</td>
<td>X intends to hold the property as a pledge or security pending the satisfaction of a debt owed to Y by X.</td>
</tr>
</tbody>
</table>

X is guilty—

- of theft or stock theft only if, when X took the property, X intended to deprive the other person permanently of his or her ownership, possession or control of the property;
- of unauthorised borrowing of the property if he did not intend to deprive the other person permanently of his or her ownership, possession or control of the property.

*Converting property originally received as pledge or security [s 122(2)]*

X—

- receives property capable of being stolen from the owner as a pledge or security pending the satisfaction of a debt owed to X; and
- thereafter X takes the property, intending to deprive the owner permanently of his or her ownership, contrary to the terms on which the person received possession,

X is guilty of theft or stock theft.

---

**Recent possession of stolen property**

[s 123]
This allows the court, in the absence of any other reasonable inference, to infer that an accused is guilty of theft, stock theft or receiving property knowing it to have been stolen if the property was recently stolen and the accused fails to account for his or her possession of it in circumstances where he or she could reasonably be expected to do so.

*When inference can be drawn [s 123(1)]*

Where X is found in possession of property that has recently been stolen and

the circumstances of X’s possession are such that X may reasonably be expected to give an explanation for his or her possession, and

X cannot explain his or her possession or gives an explanation which is false or unreasonable

a court may infer that the person is guilty of whichever of these crimes is appropriate: theft or stock theft, or of receiving it knowing it to have been stolen.

*When inference will not be drawn [s 123(2)]*

But the court must not draw this inference unless the circumstances of the possession are such that, in the absence of an explanation from X, the only reasonable inference is that he or she is guilty of theft, stock theft or receiving stolen property knowing it to have been stolen.

---

**Receiving of stolen property [s 124]**

This codifies the existing common law crime of “receiving stolen property knowing it to have been stolen”.

*Ingredients [s 124(1)]*

X takes possession of stolen property

knowing that it has been stolen or realising that there is a real risk that it was stolen

*Where did not know or realise stolen when received property [124(2)]*

If X is charged with receiving and it is proved—

➢ when X took possession of the property, X did not know that it had been stolen or did not realise that there was a real risk or possibility of this;

➢ but after taking possession X acquired such knowledge or realisation;

X may be convicted of theft or stock theft or of being found in possession of property reasonably suspected of being stolen, if the facts support such a conviction.

*Penalty [s 124(1)]*

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 7 or up to twice the value of the property</td>
<td>Up to 25 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
concerned, whichever is the greater

**Competent verdicts [s 275 read with 4th Schedule]**

- Theft;
- Unauthorised borrowing or use of property;
- Any crime of which a person might be convicted if charged with any of the crimes above.

See *Guide* pp 120-121 and 232-233.

---

**Possessing property reasonably suspected to have been stolen**

[s 125]

This re-enacts s 12(2) of the Miscellaneous Offences Act.

**Ingredients**

X is or has been in possession of property capable of being stolen, and

the circumstances of X’s possession are such as to give rise, either at the time of his or her possession or at any time thereafter, to a reasonable suspicion that when he or she came into possession of the property it was stolen; and

X is unable at any time to give a satisfactory explanation for his or her possession of the property;

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10 or up to twice the value of the property concerned</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts [s 275 read with 4th Schedule]**

- Unauthorised borrowing or use of property;
- Getting on to or interfering with or driving or riding a vehicle in contravention of s 57 of the Road Traffic Act;
- Taking or retaining hold of or boarding a vehicle or trailer in contravention of s 58 of the Road Traffic Act.
Robbery
[ss 126-129]
These sections codify the existing offence which defines robbery.

Ingredients [s 126(1)]
X steals property or does an act constituting the crime of unauthorised borrowing or use of property and

intentionally uses violence or the threat of immediate violence—
- immediately before or at the time he or she takes the property, in order to induce the person who has lawful control over the property to relinquish his or her control over it; or
- immediately after he or she takes the property, in order to prevent the person who had lawful control over the property from recovering his or her control over it.

Robbery where complainant forced to abandon control over property [s 127]
It is not a defence to a charge of robbery that, when X took possession or control over the property, the person who had lawful control over it was no longer exercising such control, if—
- when the accused first used violence or the threat of violence, that other person was in control of the property; and
- the effect of the violence or threat of violence was to render that other person unconscious or to cause him or her to run away or abandon the property or otherwise to render him or her incapable of exercising control over it.

See S v Seekoi 1984 (4) SA 690 (A)

Defences to charge of robbery [s 128]
A person accused of robbery is entitled to rely upon any defence that would have been available to the accused if he or she had been accused of theft of the property concerned.

One defence that is available is claim of right. See the following cases—
In S v Fisher 1970 (1) RLR 179 (A); 1970 (3) SA 446 (RA) a debt collector had genuinely thought he was entitled to assault the complainant to extract money owing to his principal. He was not guilty of robbery because he had had no intention to steal but he was guilty of assault.

In S v Johnson 1977 (2) RLR 3 (A); 1977 (4) SA 116 (RA) X was found not guilty of robbery. He genuinely, but mistakenly, believed that money had been stolen from him and he genuinely believed that he had a right to extract it by using force. He was not guilty of robbery but he was guilty of assault.

In S v Chimwaja GS-240-81 X had used force used to extract payment that he believed was due to him. He was found not guilty of robbery but he was guilty of assault.
**Threat of future violence** [s 129]

X is only guilty of robbery if X threatens immediate violence to take the property, to retain possession of it immediately after he steals it or in order to be able to use it.

See *S v Yolelo* 1981 (1) SA 1002 (A)

If X threatens future violence, X is not guilty of robbery but may be guilty of extortion.

**Penalty** [s 126(2)]

<table>
<thead>
<tr>
<th>If committed in aggravating circumstances</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prison for life or any shorter period</td>
<td>Fine up to level 14 fourteen or up to twice the value of the property that forms the subject of the charge, whichever is the greater</td>
</tr>
<tr>
<td>Aggravating circumstances—</td>
<td>Prison up to 50 years</td>
</tr>
<tr>
<td>When X (a perpetrator or accomplice)</td>
<td>Both.</td>
</tr>
<tr>
<td>committed the robbery—</td>
<td></td>
</tr>
<tr>
<td>➢ X possessed a firearm or a dangerous</td>
<td></td>
</tr>
<tr>
<td>weapon; or</td>
<td></td>
</tr>
<tr>
<td>➢ X inflicted or threatened to inflict</td>
<td></td>
</tr>
<tr>
<td>serious bodily injury upon any person; or</td>
<td></td>
</tr>
<tr>
<td>➢ X killed a person.</td>
<td></td>
</tr>
</tbody>
</table>

**Suspended sentence**

A court may suspend the whole or any part of a sentence of imprisonment imposed for robbery on condition that the convicted person restores any property stolen by him or her to the person deprived of it or compensates such person for its loss.

**Competent verdicts** [s 275 read with 4th Schedule]

➢ Assault;
➢ Threatening to commit murder;
➢ Theft;
➢ Making off without payment;
➢ Extortion;
➢ Malicious damage to property;
➢ Assault and theft;
➢ Any crime of which a person might be convicted if charged with any of the crimes above.

**Jurisdiction**

156
In the case of *S v Ncube* (2) 2002 (2) ZLR 524 (H) the court ruled that robbery, unlike theft, is not a continuing offence, so a person cannot be prosecuted in Zimbabwe for a robbery committed outside the country even if the proceeds of the crime have been brought into Zimbabwe.

*See Guide* pp 121-122 and 233-235.
Unlawful entry into premises
[s 131]
(formerly “housebreaking”)

This crime deals with unlawfully entry into premises.

It rationalises the existing common-law crime known as “housebreaking” or, to use the popular term, “burglary”.

The common law of housebreaking can only be committed if X intended to commit some crime inside the premises. It only had a series of highly technical requirements regarding the nature of the premises broken into and the manner of the entry. For instance, entry through an open window did not constitute housebreaking but entry after opening further a partially open window did amount to housebreaking.

The principal purpose of this crime should be to protect the privacy of one’s home from intrusion. X intrudes upon a person’s right to privacy in his or home however X enters the premises and whatever X’s purpose in effecting unauthorised entry. The law should also protect people against invasion of premises being used to store goods and this should apply whatever the manner of X’s entry into A person is also entitled to protection of his property against theft.

This crime has been completely reformulated to eliminate the unnecessarily technical requirements of housebreaking. The reformulated crime will simply treat as aggravating factors for sentence such factors as the purpose in entering, the fact that there was forcible entry and the fact that the property entered was a dwelling-house.

Ingredients [s 131(1)]

X intentionally enters the premises

without permission or authority from the lawful occupier of the premises, or without other lawful authority.

“Premises” means any movable or immovable building or structure which is used for human habitation or for storage, and includes an outbuilding, a shed, a caravan, a boat or a tent.

In S v Garanewako HH-242-10 X was convicted of unlawful entry into premises, in contravention of s 131 of the Criminal Law Code [Chapter 9:23]. He had opened the sliding gate of the complainant’s yard and entered the yard, where he was discovered. On review it was held that the conviction was wrong. “Premises”, for the purposes of s 131, means any movable or immovable building or structure used for human habitation or storage. The crime of unlawful entry into premises is nothing more than a codified version of the old offence of housebreaking with intent to commit a specified crime within the premises so broken into. The mere opening of a sliding gate of a perimeter wall surrounding the yard of a dwelling premises and only entering that yard as happened in the present case can never legally found the crime of unlawful entry into
premises. There is patently a world of difference between unlawful entry into premises and criminal trespass, which relates to and is limited to land as we know it (usually with written signs prohibiting entry) or an enclosed area on which is situated a building or structure ordinarily used for human habitation or for storage of property and is outside that building but is surrounded by a sufficient wall, fence or hedge that is continuous and has an entrance(s) either barred or capable of being barred by a gate or other means (what is commonly referred to as a yard). The correct charge should therefore have been criminal trespass as defined in s 132 (1)(a) of the Code.

“Enter” includes the following–

- to insert any part of one’s body or an instrument into the premises;
- to open or break open a door, window or gate or otherwise to remove an obstacle to entry into the premises;
- to enter the premises without having removed an obstacle, as when entry is effected through an open door, window or gate.

“Lawful occupier” of premises means any person who has lawful authority to control entry into the premises.

**Penalty [s 131(1)]**

<table>
<thead>
<tr>
<th>If committed one or more of the aggravating circumstances</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine up to level 13 or up to twice the value of any property stolen, destroyed or damaged by the person as a result of the crime, whichever is the greater</td>
<td>Fine up to level 10 or up to twice the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater,</td>
</tr>
<tr>
<td>Prison up to 15 years</td>
<td>Prison up to 10 years</td>
</tr>
<tr>
<td>Both</td>
<td>Both.</td>
</tr>
</tbody>
</table>

Aggravating circumstances

if, on the occasion on which the crime was committed, X

- entered a dwelling-house; or
- knew there were people present in the premises; or
- carried a weapon; or
- used violence against any person, or damaged or destroyed any property, in effecting the entry; or
- committed or intended to commit
In *S v Chirinda & Ors* 2009 (2) ZLR 82 (H) the judge pointed out that the essential elements of the crime are an intentional entry into premises without the authority of the lawful occupier or other lawful authority. The crime is aggravated by the fact that the accused person stole property from the premises or caused damage or destruction to property. The section does not create an offence of unlawful entry and theft, so the accused cannot be convicted of unlawful entry *and* theft, even if the facts establish that he stole from the premises he unlawfully entered. The elements of theft need not be canvassed as they would for purposes of securing a conviction for theft. The stealing of property can merely be mentioned in the agreed facts or the State outline, or in the prosecutor’s address in aggravation.

The court said an accused person who steals from the premises he unlawfully enters must be charged with contravening s 131(1)(a) of the Code for unlawful entry. He can also be charged for contravening s 113(1) of the Code for stealing from those premises if the State hopes the court may impose a stiffer sentence if the accused is charged with both offences. However, once the details of the theft have been used as an aggravating factor for the unlawful entry charge, they cannot again be used to punish the convicted person on a theft charge, as that would amount to punishing the convicted person twice for the theft which will have been taken into account in sentencing him for unlawful entry. The sentence for an unlawful entry which is accompanied by theft of property from the premises will in most cases be the same as that which would be imposed if the convicted person is convicted of unlawful entry as defined in s 131(1) and theft as defined in s 113(1) of the Code.

A simple unlawful entry not accompanied by theft, destruction or damage and not aggravated by the circumstances mentioned in subs (2) should charged under s 131(1)(b), which provides for a lower sentence than a charge under s 131(1)(a).

*Competent verdicts* [s 275 read with 4th Schedule]

- Criminal trespass;
- Any crime of which a person might be convicted if he or she were charged with criminal trespass.

---

**Criminal trespass**

[s 132]

This offence relates to unauthorised entry onto land.

This re-enacts, with modifications, section 5(b) and (c) of the Miscellaneous Offences Act.

*Ingredients* [s 132(1)]
➢ X enters any land knowing or realising that there is a real risk or possibility that such entry is forbidden; or

➢ having entered any land, X fails or refuses without lawful excuse to leave the land, or area when called upon to do so by the lawful occupier or any other person with apparent authority to require him or her to leave.

The “lawful occupier” of land is defined as any person who has lawful authority to control entry into or access to the land.

**Presumption** [132(2)]

It will be presumed, unless the contrary is shown, that a person accused of criminal trespass knew or realised that there was a real risk or possibility that entry into the land in question was forbidden where the land was an enclosed area.

An “enclosed area” means an area of land the perimeter of which is enclosed by a sufficient wall, fence or hedge that is continuous except for one or more entrances that are barred or capable of being barred by a gate or other means;

In considering whether a wall, fence or hedge is “sufficient”, no regard shall be had to its design or state of repair as long as it is apparent to a reasonable person that the wall, fence or hedge was intended to enclose the area of land concerned.

**Penalty** [s 132(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts** [s 275 read with 4th Schedule]

➢ Possessing an article for criminal use;

➢ Malicious damage to property.

---

**Extortion**

[ss 133 & 134]

These sections codify the common law crime of extortion.

**Ingredients** [s 134(1)]

X—

➢ intentionally exerts illegitimate pressure on another person;

➢ with the purpose of extracting an advantage, whether the advantage is for X or for some other person, and whether or not it is due to him or her, from that other person or causing him or her loss; and

➢ by means of the illegitimate pressure, obtains the advantage, or causes the loss.
“advantage” means any right, interest, profit, indemnity, favour or advantage of any kind whatsoever which benefits a person, whether lawfully or otherwise, or which a person believes will so benefit him or her; [This would include non-proprietary benefits such as applying illegitimate pressure on another to give of false evidence in court or to extract a promise to marry the accused.) It should be noted that unlike in Zimbabwe, in South Africa the advantage that is extracted must be of a proprietary nature.]

“exert illegitimate pressure on a person” means to do anything whatsoever which is intended to and does intimidate that person and, without limiting this definition in any way, includes—

- to threaten to do something that is lawful for the purpose of extracting an unlawful advantage from another person; and
- to threaten to do something that is unlawful for the purpose of extracting a lawful advantage from another person.

**Extorting money as compensation** [s 134(2)]

Where for the purpose of inducing or compelling the payment of any money or property as damages or as marriage compensation in respect of a deceased person,

X leaves or deposits the deceased person’s body on any land or premises occupied by another person, or hinders or prevents the burial of the deceased person’s body, he or she shall be guilty of extortion or, if he or she failed to induce or compel the payment of any money or property, attempted extortion.

The Sixth Schedule repeals s 8 of Burials and Cremations Act [Chapter 5:03] which made it an offence to dump bodies or to hinder burials in order to obtain payment of damages or marriage consideration (*roora*).

**Penalty** [s 134(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 13 or up to twice the value of any property obtained by him or her as a result of the crime, whichever is the greater</td>
<td>Up to 15 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Repayment of victim** [s 134(3)]

If a court convicting a person of extortion is satisfied that, as a result of the crime, any money or property was paid to the convicted person, the court may order the convicted person to repay that money or property to the person who paid it to him or her.

Section 366(2) and ss 367 to 375 of the Criminal Procedure and Evidence Act will apply, with the necessary modifications, in relation to any such order under as if it had been made in terms of Part XIX of the Criminal Procedure and Evidence Act.
Competent verdicts on a charge of extortion [s 275 read with 4th Schedule]

- Attempted murder;
- Assault;
- Theft;
- Malicious damage to property;
- Any crime of which a person might be convicted if charged with any of the crimes above.

In *R v Fikizolo* 1942 SR 80 at 83 a headman, X, unlawfully heard a criminal trial. He imposed a fine on Y which was not paid. He ordered Y to perform some work for him. This was an advantage and X was found guilty.

In *S v Munyani* 1971 (2) RLR 131 (A); 1972 (1) SA 411 (RA) X induced C by threats to sign a document falsely incriminating X’s wife in adultery. The court held that extortion was committed as it was not necessary to the advantage to be proprietary. (See case note in 1972 (2) *Rhodesia Law Journal* 137).

In *S v Mpofo* A-14-74 a police constable, X, told C that he had committed certain offences which would probably lead to fine of $20. He said that if he paid $20 to him, he would drop charge. As C had no money, C gave X a jacket instead. X was found guilty

In *S v Branfield* S-32-83 X was in charge of hiring and firing employees. X, extracted money from an employee by threatening to have his employment terminated unless he

See *Guide* 87-89 and 205-206.

---

**Fraud and Forgery**

**Definitions [s 135]**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>defraud</td>
<td>to commit the crime of fraud upon a person</td>
</tr>
<tr>
<td>document</td>
<td>an embodiment of any information, design or other written or depicted matter in any material form whatsoever that is capable of being read or understood by persons or machines and, without limiting this definition in any way, includes</td>
</tr>
<tr>
<td></td>
<td>coins, banknotes and negotiable instruments;</td>
</tr>
<tr>
<td></td>
<td>receipts, certificates, vouchers, tickets, invoices, stamps, marks, licences, permits, statements of account and any entry</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>in any book of account;</td>
<td></td>
</tr>
<tr>
<td>➢ paintings and other works of art;</td>
<td></td>
</tr>
<tr>
<td>➢ documents of a literary or historical nature;</td>
<td></td>
</tr>
<tr>
<td>➢ information stored by electronic means that is capable of being printed out or retrieved or displayed on a screen or terminal;</td>
<td></td>
</tr>
<tr>
<td>➢ any three-dimensional item.</td>
<td></td>
</tr>
<tr>
<td>misrepresentation</td>
<td>any act or omission of any kind whatsoever which wrongly or incorrectly represents any fact, law, character, circumstance, opinion or other thing whatsoever and, without limiting this definition in any way, includes</td>
</tr>
<tr>
<td>➢ a false statement of fact or law or a false expression of opinion;</td>
<td></td>
</tr>
<tr>
<td>➢ silence on the part of a person who has a duty to speak, knowing that another person has been or will be misled by the silence;</td>
<td></td>
</tr>
<tr>
<td>➢ a promise to do something in the future, when made by a person who knows that he or she will not be able to do that thing or who realises that there is a real risk or possibility that he or she may not be able to do it;</td>
<td></td>
</tr>
<tr>
<td>➢ a false statement by a person who wishes to borrow money or any other thing as to the purpose for which he or she requires the money or other thing;</td>
<td></td>
</tr>
<tr>
<td>➢ an exaggerated claim as to any quality of a thing that is being sold, where the person who makes the claim knows or realises that the person to whom he or she makes the claim is being or is likely to be deceived thereby;</td>
<td></td>
</tr>
<tr>
<td>➢ the use, publication or uttering of a document which contains a false statement, knowing that the document contains a false statement or realising that there is a real risk or possibility that it does so.</td>
<td></td>
</tr>
<tr>
<td>potentially prejudicial</td>
<td>involving a risk, which is not too fanciful or remote, of causing prejudice</td>
</tr>
<tr>
<td>prejudice</td>
<td>injury, harm, detriment or damage of any kind whatsoever, including material or financial prejudice, prejudice to reputation and prejudice to good administration</td>
</tr>
<tr>
<td>public document or item</td>
<td>a document or item, including a judicial document or item, issued by or on behalf of the State.</td>
</tr>
</tbody>
</table>
**Fraud**

[s 136]

**Ingredients**

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredients</th>
</tr>
</thead>
<tbody>
<tr>
<td>X makes a misrepresentation</td>
<td>X intends</td>
</tr>
<tr>
<td>The misrepresentation causes prejudice to another or is potentially prejudicial to another</td>
<td>➢ to deceive another or realises that there is a real risk of doing so; and</td>
</tr>
<tr>
<td></td>
<td>➢ to cause another person to act upon the misrepresentation to his or her prejudice, or realises that there is a real risk that another person may act upon the misrepresentation to his or her prejudice.</td>
</tr>
</tbody>
</table>

**Misrepresenting purpose for which loan required**

See *S v Reggis* 1972 (1) RLR 110 (G) and *S v Huizers* 1988 (2) SA 503 (A)

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14 or up to twice the value of any property obtained by him as a result of the crime, whichever is the greater</td>
<td>Up to 35 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts** [s 275 read with 4th Schedule]

➢ Theft;
➢ Any crime which is shown to have been committed by the person charged if it is established that his or her alleged misrepresentation was true;
➢ Any crime of which a person might be convicted if he or she were charged with theft.


---

**Forgery**

[s 137]

This section retains the common law crime of forgery, but abolishes the existing crime of “uttering” (that is, passing off as genuine) a forged document. Uttering a forged document will be
treated as fraud. If the utterer also forged the document in question, he or she will be liable for both forgery and fraud.

*Ingredients* [s 137(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredients</th>
</tr>
</thead>
<tbody>
<tr>
<td>X forges any document or item by—</td>
<td>X intends to defraud another person or realises that there is a real risk or possibility of defrauding another.</td>
</tr>
<tr>
<td>➢ making a document or signature which purports to be made by a person who did not make it or authorise it to be made or by a person who does not exist; or</td>
<td></td>
</tr>
<tr>
<td>➢ tampering with a document or item by making some material alteration, erasure or obliteration.</td>
<td></td>
</tr>
</tbody>
</table>

*Penalty* [s 137(1)]

<table>
<thead>
<tr>
<th>Forgery of public document or item</th>
<th>Document or item other than a public document or item</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine up to level 14</td>
<td>Fine up to level 13</td>
</tr>
<tr>
<td>Prison for up to 20 years</td>
<td>Prison up to 15 years</td>
</tr>
<tr>
<td>Or both.</td>
<td>Or both.</td>
</tr>
</tbody>
</table>

*Competent charges* [s 137(2)]

* X delivering forged item

Where X delivers or causes to be delivered a forged document or item to another person with the intention of defrauding that person or realising that there is a real risk or possibility of defrauding that person—

If X forged the document or item delivered, the competent charges are fraud and forgery

If X did not forge the document or item delivered, the competent charge is fraud.

*Forged item is banknote*

If the forged document or item is a banknote issued by the Reserve Bank of Zimbabwe, the competent charge is that specified in s 42 of the Reserve Bank Act.

See *Guide* pp 89-90 and 206-207.
Conviction for fraud or other crime involving misrepresentation where specific victim not identified

[s 138]

This provision re-enacts s 222 of the Criminal Procedure and Evidence Act.

If X is accused of fraud or any other crime involving the making of a misrepresentation, X may be found guilty of the crime even though–

- the person to whom the misrepresentation was made is not identified; or
- the person whom the accused intended to deceive or prejudice, or whom the accused realised he or she might be deceiving or prejudicing, is not identified; or
- the person to whom prejudice or potential prejudice was or would have been caused is not identified.
Causing Damage To or Destruction of Property

Malicious damage to property

[s 140]

The crime of malicious damage to property has been re-formulated to combine the existing common law crimes of arson and malicious injury to property. In other words what used to be charged as arson will now simply be subsumed under the crime of malicious injury to property, but the fact that fire was used to cause the damage or destruction may be an aggravating factor.

Ingredients

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X damages or destroys property knowing that another is entitled to own, possess or control the property or realising that there is a real risk or possibility that another person may be so entitled</td>
<td>X intends to cause the damage or destruction; or realises that there is a real risk that the damage or destruction might result.</td>
</tr>
</tbody>
</table>

“damage” means causing any permanent or temporary damage or injury of any kind to property, whether or not it causes financial loss to the person entitled to own, possess or control the property, and includes—

- damage or injury which necessitates the repair of the property, whatever the cost of the repair;
- the displacement, removal or breaking of a constituent part of the property;
- damage or injury which renders the property unsuitable or less suitable for the use to which it was being put;

but does not include damage or injury which is trivial in nature;

“property” means any movable or immovable material thing that is capable of being owned by a person, but does not include any of the following things—

168
- wild animals, birds, insects and fish that have not been reduced to captivity;
- eggs, honey and other produce of wild animals, birds, insects and fish, which has not been taken into possession by anyone;
- property that has been finally and absolutely abandoned by its owner, that is, thrown away or otherwise disposed of by the owner with the intention of relinquishing all his or her rights to it;
- property that is owned by the person who damages or destroys it, unless some other person has a right to possess or control the property and the person who damages or destroys it intends, by his or her act, to deprive that other person of his or her right.

**Co-owned property [s 142]**

X will have no defence to charge of malicious damage to property if he or she damages the co-owned property whether the co-ownership arises through marriage or a partnership or otherwise, if the damaging of the property was not authorised by any agreement between the person and his or her co-owner, spouse or partner.

However, no proceedings may be taken against any person accused of maliciously damaging, property belonging to the other spouse or that forms part of the spouses’ joint estate except with the leave of the Attorney-General.

**Case**

In *S v Munjoma & Anor* HH-91-04 the judge made this ruling in relation to marital property: Because a husband’s marital power is not part of the matrimonial law in Zimbabwe, where a spouse damages jointly owned matrimonial property, he or she can be guilty of malicious injury to property just like any other joint-owner or partner in a partnership. It is unnecessary to inquire into whether the spouses were married in or out of community of property once the joint ownership has been proved. Such an enquiry was previously necessary in South Africa in order to determine whether the husband enjoyed immunity consequent upon community of property marriages where the marital power had not been excluded, a position which was then erroneously imported into our own law. If any enquiry at all has to be made into the type of marriage property regime, it would be for the purpose of establishing whether the property in question was jointly-owned, in which case either spouse can be found liable, or whether it was individually and
exclusively (*res sua*) owned, in which case neither spouse nor indeed any other person, *ceteris paribus*, can be found liable.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14 or up to twice the value of the property damaged as a result of the crime, whichever is the greater</td>
<td>Up to 25 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Aggravating circumstances [s 143]**

It is an aggravating circumstance if the damage or destruction—

- is caused by the use of fire or explosives; or
- causes injury or involves a risk of injury to persons in or near the property concerned; or
- occasions considerable material prejudice to the person entitled to own, possess or control the property damaged or destroyed; or
- the property involved owned, possessed or controlled by the State, a statutory corporation or a local authority.

---

**Negligently causing serious damage to property**  
[s 141]

This creates the new crime of destroying or seriously damaging another’s property through gross negligence”. It was felt that the public interest required the creation of this new crime.

**Ingredients**

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X seriously damages or destroys property which he or she knows another person is entitled to own, possess or control</td>
<td>X was grossly negligent in causing such damage or destruction</td>
</tr>
</tbody>
</table>

**Comment**

The courts will have to decide what constitutes serious damage for the purpose of this crime and when the negligence will amount to gross negligence for the purposes of this crime.

**Co-owned property [s 142]**

X will have no defence to charge negligently causing serious damage to property if he or she damages the co-owned property whether the co-ownership arises through marriage or a
partnership or otherwise, if the damaging of the property was not authorised by any agreement between the person and his or her co-owner, spouse or partner.

However, no proceedings may be taken against any person accused of negligently causing serious damage to property belonging to the other spouse or that forms part of the spouses’ joint estate except with the leave of the Attorney-General.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Aggravating circumstances [s 143]**

It is an aggravating circumstance if the damage or destruction—

- is caused by the use of fire or explosives; or
- causes injury or involves a risk of injury to persons in or near the property concerned; or
- occasions considerable material prejudice to the person entitled to own, possess or control the property damaged or destroyed; or
- the property involved owned, possessed or controlled by the State, a statutory corporation or a local authority.

**Claim of right [s 144]**

It is defence to a charge of malicious damage to property that the accused genuinely but mistakenly believed that he or she was entitled to possess the property in question or that the owner had abandoned the property, or had consented or would have consented to its destruction. However, for defence of mistake to succeed, the belief must have been a reasonable one.

**Requirements [s 144(1)]**

X’s mistake must be genuine

X’s mistake must be a mistake that in the circumstances was reasonable

X must have mistakenly believed one of the following things—

- the owner or person entitled to possess or control the property had consented to the damage or destruction or would have consented if he or she had known of the circumstances; or
- the property was X’s own property and no other person was entitled to possess or control it; or
- the property had been finally and absolutely abandoned by its owner, that is, that the owner had thrown it away or otherwise disposed of it intending to relinquish all his or her rights in it.
Other defences [s 1444(2)]

X will also be able to rely on any of the other general defences where these are applicable.

Cases

In *S v Sangare* S-118-83 X thought the property was abandoned. He broke down the remains of a building to extract bricks. He was not guilty of malicious injury to property or theft because of the claim of right.

In *S v Mutizwa & Ors* 1988 (2) ZLR 74 (S) Xs were members of the youth wing of a political party. They were members of a group of about 100 people who went to stop building operations by the complainant in their grazing area in their communal land. They acted as they did because they had been instructed by party and government officials to prevent squatters settling in their area and cutting down trees. They believed they had a right to protect their grazing area from the depredations of squatters. The court held that on a charge of malicious injury to property the infliction of intentional wrongful injury to the property of another raises a presumption of malice, which may be rebutted by showing a bona fide belief that the act done was lawful. It is not necessary for the accused to show that such a belief was reasonable, although the reasonableness or otherwise of the belief provides cogent evidence as to whether it was held bona fide. In the present case, it was eminently reasonable for the appellants to believe that they had a legal right to remove the structures that had been erected in their grazing area and the presumption of malice was accordingly rebutted.

In *S v Mead* S-75-91 X attempted to castrate a neighbour’s bull which kept straying into his pedigree herd, threatening him with substantial losses. When the owner came to collect it he did not tell her what he had done but simply threatened to shoot it next time. The defence raised was that of claim of right. The court found that because of X’s silence at the time the owner collected the bull he could not claim he had genuinely believed he was entitled to castrate it.

In *S v Kaiwona & Ors* S-182-93 X drove cattle into a maize field and killed a goat which they claimed was theirs. It was held that X must lay a foundation for defence of claim of right by leading evidence of its existence and X had failed to do this.

In *R v Mtshiselwe & Ors* 1957 (3) SA 313 (E) – X mistakenly believing that the boundary fence had been erected in the wrong place thereby intruding onto X’s land. He had knocked down the fence. He was not guilty because of the claim of right.
Hijacking and Other Crimes Involving Aircraft

Sections 145 to 154 largely re-enact the provisions of the Aircraft (Offences) Act. The Aircraft (Offences) Act is repealed in its entirety.

**Hijacking**  
[s 147]

*Ingredients*

Without lawful reason X takes or exercises control over an aircraft.

*Penalty*

Imprisonment for life or for any shorter period.

*Competent verdicts on charge of hijacking* [s 275 read with 4th Schedule]

- Attempted murder;
- Kidnapping or unlawful detention;
- Robbery;
- Damaging destroying or prejudicing the safe operation of an aircraft;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

**Destroying or prejudicing the safe operation of an aircraft**  
[s 148]

*Ingredients*

Without lawful reason—

- X intentionally damages or destroys an aircraft; or
- X does or omits to do anything intending to prejudice the safe operation of an aircraft or realising that there is a real risk of doing so.

*Penalty*

Imprisonment for up to 25 years.

*Competent verdicts on charge of destroying or prejudicing the safe operation of an aircraft* [s 275 read with 4th Schedule]

- Placing or carrying dangerous goods on an aircraft;
- Malicious damage to property;
- Any crime of which a person might be convicted if he or she were charged with the crimes above.
Assaulting, intimidating or threatening a person on an aircraft
[s 249]

Ingredients
Without lawful reason—
X assaults, intimidates or threatens any person aboard an aircraft;
with the intention or realising that there is a real risk or possibility
➢ of interfering with the performance of the functions of any member of the aircraft crew; or aircraft; or
➢ of lessening the ability of such member to perform those functions.

Penalty
Imprisonment for up to 5 years.

Competent verdicts [s 275 read with 4th Schedule]
➢ Placing or carrying dangerous goods on an aircraft;
➢ Assault;
➢ Any crime of which a person might be convicted if he or she were charged with the crimes above

Placing or carrying dangerous goods on an aircraft
[s 150]

Ingredients
Without lawful reason—
➢ placing or carrying any dangerous goods aboard an aircraft; or
➢ causing any dangerous goods to be placed or carried aboard an aircraft; or
➢ delivering dangerous goods to a person for the purpose of their being placed aboard an aircraft; or
➢ having dangerous goods in his or her possession aboard an aircraft.

This crime is not committed if X does any of these things—
➢ with the consent of the owner or operator of the aircraft, given with the knowledge of the nature of the goods;
➢ in accordance with the Civil Aviation Act or any regulations in terms of that Act;
➢ by a person in the course of his or her lawful duties as an employee of the State.

Penalty
Imprisonment for up to 5 years.

*Competent verdicts* [s 275 read with 4th Schedule]

- Threatening harm in relation to an aircraft;
- Possessing or using a firearm or explosives in contravention of any enactment.

---

**Threatening harm in relation to an aircraft**

* [s 151]

**Ingredients**

Without lawful reason—

X threatens; states an intention or makes a statement from which there is a reasonable inference that X intends
to damage, destroy or prejudice the safe operation of an aircraft or to kill, injure or harm any person aboard an aircraft.

**Penalty**

Imprisonment for up to 5 years.

*Competent verdicts* [s 275 read with 4th Schedule]

- Threatening to commit murder;
- Extortion;
- Attempted malicious damage to property;
- Falsely threatening harm in relation to an aircraft;
- Any crime of which a person might be convicted if charged with any of the crimes above.

---

**Falsely threatening harm in relation to an aircraft**

* [s 152]

**Ingredients**

Without lawful reason—

X makes a statement knowing that it is false or realising that there is a real risk that it may be false
to the effect that, or from which it can reasonably be inferred that, there has been or is to be a plan, proposal, attempt, conspiracy or threat—

unlawfully to take or exercise control over an aircraft; or unlawfuly to destroy, damage or prejudice the safe operation of an aircraft; or unlawfuly to kill or injure any person aboard an aircraft.
**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Proof of lawful reason**

[s 153]

If X raises the defence of a lawful reason for his or her action in relation to an aircraft offence X must prove any fact or circumstance that would constitute a lawful reason for that conduct.

**Alternative to or concurrent charges to aircraft offences**

[s 154]

If X commits an aircraft offence—

- in pursuance of an act of insurgency, banditry, sabotage or terrorism, the person may be charged concurrently or alternatively with insurgency, banditry, sabotage or terrorism; or
- that results in or was intended to cause the death of another person, whether or not in pursuance of an act an act of insurgency, banditry, sabotage or terrorism the person may be charged concurrently with murder or attempted murder.
Sections 155 to 161 provide for crimes involving dangerous drugs. At present, these crimes are provided for under the Dangerous Drugs Act and the Medicines and Allied Substances Control Act.

Every major offence that concerns a “dangerous” or “prohibited” has been excised from those Acts and re-enacted here in the Code.

However, the administrative, procedural and other provisions relating to the control of such drugs (their specification and classification, the restriction of their import, export and distribution, their forfeiture and custody, and so forth) will remain in the appropriate Acts.

**Definitions**

[s 155]

This section contains definitions of terms used in connection with offences involving dangerous drugs. The definition of “dangerous drug” comprehensively encompasses the plants and drugs specifically prohibited and controlled by the Dangerous Drugs Act (that is, the coca, opium poppy and cannabis plants and their derivatives), and the drugs prohibited by the Medicines and Allied Substances Control Authority established under the Medicines and Allied Substances Control Act. The definition of “deal in” in relation to a dangerous drug re-enacts the definition of the same term contained in section 19 (7) of the Dangerous Drugs Act and section 42 of Medicines and Allied Substances Control Act.

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>authority</td>
<td>the Medicines and Allied Substances Control Authority established by section 3 of the Medicines and Allied Substances Control Act or any body that succeeds to its functions.</td>
</tr>
<tr>
<td>cannabis</td>
<td>the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.</td>
</tr>
<tr>
<td>cannabis plant</td>
<td>the whole or any portion, whether green or dry, of any plant of the genus cannabis also known as “Indian hemp”, <em>bhang, camba, dagga, mbanje</em> or <em>intsangu</em>, but excluding--</td>
</tr>
<tr>
<td></td>
<td>➢ any fibre extracted from the plant for use as or in the manufacture of cordage, canvas or similar products; or</td>
</tr>
<tr>
<td></td>
<td>➢ any seed which has been crushed, comminuted or otherwise processed in such a manner as to prevent germination; or</td>
</tr>
<tr>
<td></td>
<td>➢ the fixed oil obtained from the seed.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>cannabis resin</td>
<td>the separated resin, whether crude or purified, obtained from the cannabis plant.</td>
</tr>
<tr>
<td>coca bush</td>
<td>the plant of any species of the genus erythroxylon.</td>
</tr>
<tr>
<td>coca leaf</td>
<td>the leaf of the coca bush except a leaf from which all ecgonine alkaloids have been removed.</td>
</tr>
</tbody>
</table>
| dangerous drug              | ➢ any coca bush, coca leaf, raw opium or cannabis plant;  
➢ prepared opium, prepared cannabis or cannabis resin;  
➢ a scheduled drug.                                                                 |
| deal in a dangerous drug    | includes to sell or to perform any act, whether as a principal, agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, trans-shipment, supply, administration, manufacture, cultivation, procurement or transmission of such drug. |
| medicinal opium             | opium which has undergone the processes necessary to adapt it for medicinal use.                                                           |
| opium                       | the coagulated juice of the opium poppy.                                                                                                 |
| opium poppy                 | the plant of the species *Papaver somniferum L.*                                                                                          |
| poppy straw                 | all parts (except the seeds) of the opium poppy, after mowing.                                                                             |
| prepared cannabis           | cannabis which has been prepared for smoking and any dross or other residue remaining after cannabis has been smoked.                     |
| prepared opium              | opium prepared for smoking and any dross or other residue remaining after opium has been smoked.                                           |
| raw opium                   | powdered or granulated opium, but does not include medicinal opium.                                                                      |
| scheduled drug              | a drug specified in Part I or Part II of the Schedule to the Dangerous Drugs Act, and the term “Part I scheduled drug” will be construed accordingly. |
Unlawful dealing in dangerous drugs

[s 156]

This combines the crimes and penalties specified in s 9 (a) and (g) and 19 (2) and (3) of the Dangerous Drugs Act, and s 44 of the Medicines and Allied Substances Control Act; it also incorporates certain other penal provisions specifically required or recommended by the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“Vienna Convention”).

Ingredients [s 156(1)]
X unlawfully does any of the following in relation to a dangerous drug—

- imports, exports, sells, offers or advertises for sale, distributes, delivers, transports or otherwise deals in the drug;
- cultivates, produces or manufactures the drug for the purpose of dealing in it;
- possesses the drug, or any article or substance used in connection with the production or manufacture of the drug, for the purpose of dealing in such drug;
- incites another person to consume the drug;
- supplies or administers to or procures for any person, or offers to supply or administer to or procure for any person, the drug.

Penalty [s 156(1)]

<table>
<thead>
<tr>
<th>Committed in aggravating circumstances and no special circumstances peculiar to the case</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prison for not less than 15 years or more than 20 years. Fine not below level 14 or, in default of payment, prison for additional period of not less than 5 years or more than 10 years.</td>
<td>Fine up to or exceeding level 14 Prison up to 15 years Both.</td>
</tr>
</tbody>
</table>

The court may not order that the operation of the whole or any part of this sentence be suspended. [s 156(4)]
**Aggravating circumstances [s 156(2)]**

If the dangerous drug was a drug other than any cannabis plant, prepared cannabis, or cannabis resin and X

- was a member of a group of persons organised within or outside Zimbabwe for the purpose of committing the crime; or
- employed weapons or engaged in violence in the course of committing the crime; or
- held a public office which he or she abused to facilitate the commission of the crime; or
- being over the age of 18 years, incited any minor to consume or deal in a dangerous drug; or
- was previously convicted, whether within or outside Zimbabwe, of a crime constituted by any of the acts relating to unlawful dealing in drugs.

**Special circumstances [s 156(3)]**

If X is convicted of dealing in a dangerous drug in aggravating circumstances and X satisfies the court that there are special circumstances peculiar to the case why the penalty provided under for conviction of this crime in aggravating circumstances should not be imposed, X will be liable to the penalty provided for conviction for this crime without aggravating circumstances. The court finding special circumstances must record what these circumstances were.

---

**Unlawful possession or use of dangerous drugs [s 157]**

This section combines the crimes and penalties specified in s 9 (b), (e) and (f) of the Dangerous Drugs Act and s 45 of the Medicines and Allied Substances Control Act.

**Ingredients [s 157(1)]**

X unlawfully—

- acquires or possesses a dangerous drug; or
- ingests, smokes or otherwise consumes a dangerous drug; or
- cultivates, produces or manufactures a dangerous drug for his or her own consumption.

**Penalty [s 157(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Where it is established that the person convicted is addicted to a dangerous drug, the court may, additionally or alternatively to the sentence imposable for this crime, impose a sentence requiring the person to undergo treatment for such addiction. [s 157(2)]
Extra-territorial effect

[s 158]

This re-enacts section 19 (1) (d) of the Dangerous Drugs Act by giving extra-territorial effect on a reciprocal basis to the crimes specified in clauses 155 and 156: in other words, if such crimes are committed outside Zimbabwe by Zimbabwean citizens or Zimbabwean residents in countries where the offending acts are also crimes, the offenders may be prosecuted in Zimbabwe. This is in keeping with the spirit of mutual assistance in the prosecution of drug crimes that is encouraged by the Vienna Convention and other narcotics conventions.

Drug crime committed outside Zimbabwe [s 158(1)]

If X is a citizen of Zimbabwe or ordinarily resident therein and X does anything outside Zimbabwe which, if it were done in Zimbabwe, would—

- constitute the crime of unlawful dealing in dangerous drugs or unlawful possession or use of dangerous drugs;
- constitute an attempt, conspiracy or incitement to commit one of these crimes;
- render him or her liable as an accomplice or accessory to one of these crimes;

and such crime is punishable under a corresponding law in force in that place outside Zimbabwe, X will be guilty of the appropriate drug crime under Zimbabwean law.

Incitement or conspiracy by person in Zimbabwe to commit drug crime outside Zimbabwe [s 158(2)]

X will be guilty of conspiracy or incitement, to commit the appropriate crime and liable to be sentenced accordingly if—

- X who, in Zimbabwe, conspires with or incites another person to do anything outside Zimbabwe which, if it were done in Zimbabwe, would constitute the crime of unlawful dealing in dangerous drugs or unlawful possession or use of dangerous drugs; and
- such crime is punishable under a corresponding law in force in that place outside Zimbabwe.

Permitting premises to be used for unlawful dealing in or use of dangerous drugs

[s 159]

This re-enacts s 9 (c) and (d) of the Dangerous Drugs Act.

Ingredients
X who is the occupier of any premises,
permits those premises to be used for purpose of the unlawful cultivation, manufacture, sale, supply, storage or consumption of a dangerous drug;
or
X is concerned in the management of any premises used for any of these purposes.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Concealing, disguising or enjoying proceeds of unlawful dealing in dangerous drugs**

[s 160]

This creates the crime of concealing, disguising or enjoying the proceeds of the unlawful dealing in dangerous drugs. This crime is a specific version of the general offence of “money-laundering” contained in section 63 of the Serious Offences (Confiscation of Profits) Act.

**Ingredients**

Any person who, knowing that any property is derived from the unlawful dealing in dangerous drugs, or realising that there is a real risk or possibility that any property may be so derived—

- converts or transfers such property for the purpose of concealing or disguising the origin of the property; or
- conceals or disguises the true nature, source, location, disposition, movement, rights with respect to, or ownership of such property; or
- acquires, possesses or uses such property;

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 12</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Lawful possession**

[s 161]

This section stipulates who may lawfully possess, deal in or use dangerous drugs.

<table>
<thead>
<tr>
<th>Person</th>
<th>Scope of lawfulness</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ a person licensed to do so under the Medicines and Allied Substances Control Act;</td>
<td>Such person may, in that capacity and so far as is necessary for the practice or exercise of that</td>
</tr>
<tr>
<td>➢ any medical practitioner, dental practitioner or</td>
<td></td>
</tr>
</tbody>
</table>
veterinary surgeon;
- any pharmaceutical chemist licensed in terms of the Medicines and Allied Substances Control Act or pharmaceutical chemist or other person—
  - employed in a hospital, clinic, dispensary or like institution administered by the State or by a local authority, or in any other hospital, clinic, dispensary or like institution approved by the Minister responsible for health; or
  - employed in any medical store of the State;
- any person in charge of a laboratory used for the purposes of research or instruction and attached to—
  - a university, a university college or other educational institution approved by the Minister responsible for health; or
- any hospital referred to in s 161(c);
- any analyst employed by the State; or
- any inspector appointed in terms of the Medicines and Allied Substances Control Act; or
- any other person prescribed by the Minister by notice in a statutory instrument after consultation with the Minister responsible for health;

A qualified nurse in charge of a ward, theatre or out-patients’ department in any hospital administered by the State or by a local authority, or in any other hospital, approved by the Minister responsible for health; or

A qualified nurse who is employed in a supervisory capacity over two or more wards in any hospital administered by the State or by a local authority, or in any other hospital, approved by the Minister responsible for health and has been appointed by the medical practitioner in charge of the hospital to be responsible at any time for the distribution of Part I scheduled drugs within the hospital.

A person licensed by the Authority

| person’s profession, function or employment, lawfully acquire, possess and supply any coca bush, cannabis plant, raw opium or scheduled drug and, in the case of a Part I scheduled drug, prescribe, administer, manufacture or compound such drug. |
|---|---|---|---|
| A person licensed by the Authority | Such person may, in that capacity and so far as is necessary for the practice of that nurse’s profession, function or employment, lawfully acquire, administer, possess and supply a Part I scheduled drug. | Such person may, in accordance with the terms and conditions of the licence, import or export opium poppies, coca bushes, cannabis plants or a Part I scheduled drug. |
A person licensed by the Authority may, in accordance with the terms and conditions of the licence, cultivate opium poppies, coca bushes or cannabis plants.

A person licensed by the Authority may, in accordance with the terms and conditions of the licence and on premises authorised or licensed by the Authority for the purpose, manufacture a Part I scheduled drug or carry on any process in the manufacture of a Part I scheduled drug.

Any person to whom a Part I scheduled drug has been supplied in accordance with a prescription by a medical practitioner, dental practitioner or veterinary surgeon will be regarded as a person lawfully in possession of that drug. But this person will not be treated as a person lawfully in possession of that drug if, at the time when he or she is so supplied, he or she is also being supplied with a Part I scheduled drug by or on a prescription given by another medical practitioner, and did not disclose that fact to the first-mentioned medical practitioner.
Computer-Related Crimes

Sections 162 to 168 provide for computer-related crimes (often collectively described as “cyber-crime”) in line with the recommendations of the Law Development Commission of Zimbabwe made in its Report No. 75 (“Computer-Related Crime”) (November, 1999). That report demonstrated the potential for fraud, sabotage and other harm that may be caused to the public interest by the deliberate misuse of computers, credit and debit cards, passwords and pin-numbers.

There are a number of crimes to deal with the problems of computer hacking. These include the crimes of unauthorised access to or use of a computer, deliberate introduction of a computer virus into a computer or computer network and unauthorised manipulation of a proposed computer program.

Definitions [s 162]

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>computer</td>
<td>a device or apparatus or series of devices which, by electronic, electromagnetic, electro-mechanical or other means, is capable of one or more of the following—</td>
</tr>
<tr>
<td></td>
<td>➢ receiving or absorbing data and instructions supplied to it;</td>
</tr>
<tr>
<td></td>
<td>➢ processing data according to rules or instructions;</td>
</tr>
<tr>
<td></td>
<td>➢ storing and additionally, or alternatively, reproducing data before or after processing the data.</td>
</tr>
<tr>
<td></td>
<td>It includes</td>
</tr>
<tr>
<td></td>
<td>➢ the devices or apparatus or series of devices commonly known as automatic telling machines, electronic cash registers and point-of-sale tills; and</td>
</tr>
<tr>
<td></td>
<td>➢ any other device or apparatus used for the electronic processing of monetary transactions.</td>
</tr>
<tr>
<td>computer virus</td>
<td>any set of computer instructions that are, or any data, programme or system that is, designed directly or indirectly to—</td>
</tr>
<tr>
<td></td>
<td>destroy or alter; or render meaningless, useless or ineffective; or obstruct, intercept, divert, interrupt or interfere with the use of;</td>
</tr>
<tr>
<td></td>
<td>any computer or computer network.</td>
</tr>
<tr>
<td></td>
<td>The Minister may, by notice in a statutory instrument—</td>
</tr>
<tr>
<td></td>
<td>➢ specify as a computer any particular device or apparatus that is or may be comprised within the definition of “computer”; or</td>
</tr>
</tbody>
</table>
exclude from the definition of “computer” any specified device or apparatus.

the interconnection of one or more computers through—
- the use of satellite, microwave, terrestrial line or other communication media; or
- computer terminals, or a complex consisting of two or more interconnected computers, whether or not the interconnection is continuously maintained.

a card, disc, plate or token which, directly or indirectly, causes a computer to function;

representations of information or concepts that are being prepared or have been prepared for storage or use in a computer

These have the meanings given to them in s 19.

an operation or exercise of logic, control, arithmetic, deletion, storage, retrieval and communication within, to or from a system

in relation to a computer or computer network, means the owner or person entitled to possess or control the computer or computer network

any combination of letters, numbers or symbols that belongs or is assigned to a particular user for the purpose of enabling that user to gain access to a programme or system which is held in a computer or computer network

data or a set of instructions which, when executed in a computer, causes the computer to perform a function

an arrangement of data or one or more programmes which, when executed, performs a function

**Unauthorised access to computers**

[s 163]

This crime is restricted to cases where the unlawful access is “material”, because many instances of unauthorised access to computers are trivial or inoffensive. It is a defence that the access did not have any material effects.

**Ingredients** [s 163(1)]

Without authority from the owner of the computer or computer network, X intentionally–
- gains access to; or
- destroys or alters; or
- renders meaningless, useless or ineffective; or
- copies or transfers; or
- obstructs, intercepts, diverts, interrupts or interferes with the use of;

any data, programme or system which is held in a computer or computer network

**Defence** [s 163(2)]

It is a defence for X to prove that
- the conduct was not motivated by malice; and
- the conduct did not materially affect the data, programme or system nor the interests of the owner of the computer or computer network.

**Penalty** [s 163(1)]

<table>
<thead>
<tr>
<th>Crime committed in any of the aggravating circumstances in s 166.</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine up to level 12</td>
<td>Fine up to level 8</td>
</tr>
<tr>
<td>Prison up to 10 years</td>
<td>Prison up to 3 years</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>

**Deliberate introduction of computer virus into computer or computer network**

[s 164]

**Ingredients**

Without authority from the owner of the computer or computer network, X knowingly–introduces or causes to be introduced any computer virus into any computer or computer.

**Penalty**

<table>
<thead>
<tr>
<th>Crime committed in any of the aggravating circumstances in s 166.</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine up to level 12</td>
<td>Fine up to level 8</td>
</tr>
<tr>
<td>Prison up to 10 years</td>
<td>Prison up to 3 years</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>

**Unauthorised manipulation of proposed computer programme**

[s 165]

**Ingredients**
X fraudulently or mischievously creates, alters or manipulates any data, programme or system (or any part or portion thereof) which is intended for installation in a computer.

**Penalty**

<table>
<thead>
<tr>
<th>Crime committed in any of the aggravating circumstances in s 166.</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine up to level 12</td>
<td>Fine up to level 8</td>
</tr>
<tr>
<td>Prison up to 10 years</td>
<td>Prison up to 3 years</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>

**Aggravating circumstances**

[s 166]

The crime of unauthorised access to or use of a computer, deliberate introduction of a computer virus into a computer or computer network, or unauthorised manipulation of a proposed computer programme is committed in aggravating circumstances if—

- committed in connection with or in furtherance of the commission or attempted commission of the crime of insurgency, banditry, sabotage or terrorism, theft, unauthorised borrowing or use of property, extortion, fraud, forgery, malicious damage to property, damaging, destroying or prejudicing the safe operation of an aircraft, concealing, disguising or enjoying the proceeds of the unlawful dealing in dangerous drugs, corruptly using a false document or defeating or obstructing the course of justice; or

- the computer, computer network, data, programme or system is owned by the State, a law enforcement agency, the Defence Forces, the Prison Service, a statutory corporation or a local or like authority; or

- the crime occasions considerable material prejudice to the owner of the computer, computer network, data, programme or system; or

- the crime disrupts or interferes with an essential service.

**Unauthorised use or possession of credit or debit cards**

[s 167]

**Ingredients**

Without authority, X manufactures copies or uses any credit or debit card belonging to another; or
Without reasonable excuse, X possesses any credit or debit card belonging to another

*Penalty*

<table>
<thead>
<tr>
<th></th>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorised</td>
<td>Up to level 8</td>
<td>Up to 3 years</td>
<td>Both</td>
</tr>
<tr>
<td>use of password or pin-number</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Unauthorised use of password or pin-number*  
*[s 168]*

*Ingredients*

Without authority X intentionally uses any password or pin-number belonging or assigned to another.

*Penalty*

Fine up to level 8

Imprisonment for up to 3 years

Both.
## Bribery and Corruption

Sections 169 to 175 re-enact, expand upon and add to the crimes contained in the Prevention of Corruption Act.

Sections 170 to 172, which provide for crimes of bribery, corruptly using a false document and corruptly concealing a transaction from a principal, re-enact section 3 (1) (a), (b), (c) and (f) of the Prevention of Corruption Act.

### Definitions [s 169]

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>agent</td>
<td>A person employed by or acting for another person in any capacity whatsoever. Without limiting this definition in any way, this includes—</td>
</tr>
<tr>
<td></td>
<td>- a director or secretary of a company;</td>
</tr>
<tr>
<td></td>
<td>- the trustee of an insolvent estate;</td>
</tr>
<tr>
<td></td>
<td>- the assignee of an estate that has been assigned for the benefit or with the consent of creditors;</td>
</tr>
<tr>
<td></td>
<td>- the liquidator of a company or other body corporate that is being wound up or dissolved;</td>
</tr>
<tr>
<td></td>
<td>- the executor of the estate of a deceased person;</td>
</tr>
<tr>
<td></td>
<td>- the legal representative of a person who is a minor or of unsound mind or who is otherwise under legal disability;</td>
</tr>
<tr>
<td></td>
<td>- a public officer; a member of a board, committee or other authority which is responsible for administering the affairs or business of a body corporate or association other than a statutory body or local authority;</td>
</tr>
<tr>
<td></td>
<td>- a person who voluntarily and without the knowledge or consent of another</td>
</tr>
<tr>
<td></td>
<td>- manages the affairs or business of another person; or takes care of the property of another.</td>
</tr>
<tr>
<td>consideration</td>
<td>any right, interest, profit, indemnity, benefit or advantage of any kind whatsoever.</td>
</tr>
<tr>
<td>local authority</td>
<td>a city, municipality, town council, town board, provincial council, rural district council or any similar body established by or in terms of any enactment.</td>
</tr>
<tr>
<td>principal</td>
<td>The employer or other person for whom an agent acts.</td>
</tr>
</tbody>
</table>
In relation to a trustee, assignee, liquidator, executor or legal representative referred to in the definition of “agent”, this includes—

- all persons represented by the trustee, assignee, liquidator, executor or legal representative, as the case may be, or in relation to whom he or she stands in a position of trust; and
- any public officer who is responsible for supervising the activities of the trustee, assignee, liquidator, executor or legal representative.

In relation to a public officer who is a Minister and a member of the Cabinet, this includes—

- both the State and the Cabinet.

In relation to a member of a council, board, committee or authority which is responsible for administering the affairs or business of a statutory body, local authority, body corporate or association

- includes both such council, board, committee or authority and the statutory body, local authority, body corporate or association for whose affairs or business it is responsible.

| public officer | ➢ a Vice-President, Minister or Deputy Minister; or |
|               | ➢ a governor appointed in terms of an Act referred to in s 111A of the Constitution; or |
|               | ➢ a member of a council, board, committee or other authority which is a statutory body or local authority or which is responsible for administering the affairs or business of a statutory body or local authority; or |
|               | ➢ a person holding or acting in a paid office in the service of the State, a statutory body or a local authority. |

| statutory body | any Commission established by the Constitution; or |
|               | any body corporate established directly by or under an Act for special purposes specified in that Act. |

---

**Bribery**

[s 170]

*Ingredients [s 170(1)]*
A agent who obtains or agrees to obtain or solicits or agrees to accept for himself or herself or any other person any gift or consideration as an inducement or reward—

- for doing or omitting to do, or having done or omitted to do, any act in relation to his or her principal’s affairs or business; or
- for showing or not showing, or having shown or not shown, any favour or disfavour to any person or thing in relation to his or her principal’s affairs or business

knowing or realising that there is a real risk or possibility that such gift or consideration is not due to him or her in terms of any agreement or arrangement between himself or herself and his or her principal.

Any person who, for himself or herself or any other person, gives or agrees to give or offers to an agent any gift or consideration as an inducement or reward—

- for doing or omitting to do, or having done or omitted to do, any act in relation to his or her principal’s affairs or business; or
- for showing or not showing, or having shown or not shown, any favour or disfavour to any person or thing in relation to his or her principal’s affairs or business;

knowing or realising that there is a real risk or possibility that such gift or consideration is not due to the agent in terms of any agreement or arrangement between the agent and his or her principal.

**Presumption [s 170(2)]**

If the prosecution proves that—

- an agent has obtained, agreed to obtain or solicited any gift or consideration, whether for himself or herself or for another person; or
- any person has given, agreed to give or offered any gift or consideration—
  - to an agent, whether for himself or herself or for another person; or
  - to any other person, after agreeing with an agent to do so;

it will be presumed, unless the contrary is proved, that he or she did so in contravention of this section.

**Penalty [s 170(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14 or up to three times the value of any consideration obtained or</td>
<td>Up to 20 years</td>
<td>Both</td>
</tr>
</tbody>
</table>
given in the course of the
crime, whichever is the
greater

Competent verdicts [s 275 read with 4th Schedule]

➤ Corruptly using a false document;
➤ Corruptly concealing a transaction from a principal;
➤ Corruptly concealing from a principal a personal interest in a transaction;
➤ Criminal abuse of duty as a public officer;
➤ Extortion;
➤ Theft.

See Guide pp 74-75 and 186

---

**Corruptly using false document**

[s 171]

**Ingredients** [s 171(1)]

<table>
<thead>
<tr>
<th>Agent</th>
<th>Other person</th>
</tr>
</thead>
</table>
| An agent who, in connection with his or her principal’s affairs or business, uses a document which contains a false statement—
➤ knowing that the document contains a false statement or realising that there is a real risk or possibility that it may do so; and
➤ intending by the use of the document to deceive his or her principal, or realising that there is a real risk or possibility that his or her use of the document may deceive his or her principal. |
| A person who gives an agent a document which contains a false statement—
➤ knowing that the document contains a false statement or realising that there is a real risk or possibility that it may do so; and
➤ intending to deceive the agent or the agent’s principal or realising that there is a real risk or possibility that by his or her use of the document the agent or the agent’s principal may be deceived. |

Where a person gives an agent a false document, intending to deceive the agent or the agent’s principal in the conduct of his or her principal’s affairs or business or realising that there is a real risk or possibility that the agent
or the agent’s principal may be so deceived—the person shall be presumed, unless the contrary is proved, to intend to deceive the agent’s principal as well as the agent, or to realise that there is a real risk or possibility that the agent’s principal as well as the agent may be deceived, as the case may be.

[s 171(2)]

**Penalty [s 171(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 20 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts [s 275 read with 4th Schedule]**
- Bribery;
- Any crime of which a person might be convicted if he or she were charged with bribery.

---

**Corruptly concealing transaction from principal**

[s 172]

**Ingredients [s 172(1)]**

<table>
<thead>
<tr>
<th>Agent</th>
<th>Other person</th>
</tr>
</thead>
</table>
| An agent has carried out a transaction in connection with his or her principal’s affairs or business and fails to disclose to the principal the full nature of the transaction—
  - intending to deceive the principal or realising that there is a real risk of doing so; or
  - intending to obtain a consideration knowing or realising that there is a real risk that such consideration is not due to him or her in terms of any agreement or arrangement between himself or herself and the principal. | A person who carries out a transaction with an agent in connection with the affairs or business of the agent’s principal; or assists an agent to carry out any such transaction;
  - knowing that the agent does not intend to disclose to the principal the full nature of the transaction. |
**Competent charge** [s 172(2)]

The competent charge for the following situation is conspiracy to commit the crime of corruptly concealing a transaction from a principal—

An agent agrees or arranges with another person or a person agrees or arranges with an agent not to disclose to the agent’s principal the full nature of any transaction which the agent has carried out or will carry out in connection with the principal’s affairs or business, and the agent or person so agreed or arranged—

- intending to deceive the principal or realising that there is a real risk or possibility that the principal may be deceived; or
- intending that the agent should obtain a consideration knowing or realising that there is a real risk or possibility that such consideration is not due to the agent in terms of any agreement or arrangement between the agent and the principal;

**Presumption** [s 172(3)]

<table>
<thead>
<tr>
<th>Facts proved</th>
<th>Presumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecution proves that the agent</td>
<td>Unless the contrary is proved, the agent will be presumed to have done so intending to deceive the principal, or to obtain a consideration for himself or herself knowing or realising that there is a real risk or possibility that such consideration is not due to him or her in terms of any agreement or arrangement between himself or herself and the principal, as the case may be.</td>
</tr>
<tr>
<td>agreed or arranged with another person that the full nature of any transaction should not be disclosed to the agent’s principal; or</td>
<td></td>
</tr>
<tr>
<td>failed to disclose to his or her principal the full nature of any transaction.</td>
<td></td>
</tr>
<tr>
<td>A person agreed or arranged with an agent that the full nature of any transaction should not be disclosed to the agent’s principal.</td>
<td>Unless the contrary is proved, it will be presumed that the person did so intending to deceive the agent’s principal.</td>
</tr>
<tr>
<td>A person carried out a transaction with an agent or assisted an agent to carry out a transaction the full nature of which was not disclosed to the agent’s principal.</td>
<td>Unless the contrary is proved, the person will be presumed to have known that the agent did not intend to disclose to the principal the full nature of the transaction.</td>
</tr>
</tbody>
</table>

**Penalty** [s 172(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 20 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts** [s 275 read with 4th Schedule]
Bribery:
Any crime of which a person might be convicted if he or she were charged with bribery.

**Corruptly concealing personal interest in transaction from principal**

[s 173]

This creates the new crime of corruptly concealing from a principal a personal interest in a transaction.

*Ingredients* [s 173(1)]

<table>
<thead>
<tr>
<th>Agent</th>
<th>Other person</th>
</tr>
</thead>
<tbody>
<tr>
<td>An agent who carries out any transaction in connection with his or her principal’s affairs or business without disclosing to the principal that he or she holds a personal interest in the subject matter of the transaction intending to deceive the principal or realising that there is a real risk of doing so; or intending to obtain a consideration or realising that there is a real risk that such consideration is not due to him or her in terms of any agreement or arrangement between himself or herself and the principal.</td>
<td>A person who carries out any transaction with an agent in connection with the affairs or business of the agent’s principal or assists an agent to carry out any such transaction knowing that the agent does not intend to disclose to the principal that the agent has a personal interest in the subject-matter of the transaction.</td>
</tr>
</tbody>
</table>

*Competent charge of conspiracy* [s 173(2)]

The competent charge for the following situation is conspiracy to commit the crime of corruptly concealing from a principal a personal interest in a transaction—

An agent agrees or arranges with another person or a person agrees or arranges with an agent not to disclose to the agent’s principal any personal interest held by the agent in the subject-matter of any transaction which the agent has carried out or will carry out in connection with the principal’s affairs or business, and the agent or person so agreed or arranged—

- intending to deceive the principal or realising that there is a real risk or possibility that the principal may be deceived; or
➢ intending that the agent should obtain a consideration knowing or realising that there is a real risk or possibility that such consideration is not due to the agent in terms of any agreement or arrangement between the agent and the principal;

**Presumption [s 173(3)]**

<table>
<thead>
<tr>
<th>Facts proved</th>
<th>Presumption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecution proves that the agent</td>
<td>Unless the contrary is proved, the agent will be presumed to have done so intending to deceive the principal, or to obtain a consideration for himself or herself knowing or realising that there is a real risk or possibility that such consideration is not due to him or her in terms of any agreement or arrangement between himself or herself and the principal, as the case may be.</td>
</tr>
<tr>
<td>➢ agreed or arranged with another person that the agent’s personal interest in the subject-matter of any transaction should not be disclosed to the agent’s principal; or</td>
<td></td>
</tr>
<tr>
<td>➢ failed to disclose to his or her principal the agent’s personal interest in the subject-matter of the transaction.</td>
<td></td>
</tr>
<tr>
<td>A person agreed or arranged with an agent that the agent’s personal interest in the subject matter of the transaction should not be disclosed to the agent’s principal.</td>
<td>Unless the contrary is proved, it will be presumed that the person did so intending to deceive the agent’s principal.</td>
</tr>
<tr>
<td>A person carried out a transaction with an agent or assisted an agent to carry out a transaction in which the agent’s personal interest in the subject matter of the transaction was not disclosed to the agent’s principal.</td>
<td>Unless the contrary is proved, the person will be presumed to have known of the agent’s personal interest and that the agent did not intend to disclose to the principal the agent’s personal interest in the subject-matter of the transaction.</td>
</tr>
</tbody>
</table>

**Penalty [s 173(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 14</td>
<td>Up to 20 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Competent verdicts on this charge [s 275 read with 4th Schedule]**

➢ Bribery;
➢ Any crime of which a person might be convicted if he or she were charged with bribery.
Criminal abuse of duty by a public officer

[§ 174]

Section 174 providing for the criminal abuse of duty by a public officer for the purpose of showing favour or disfavour to any person, re-enacts and expands upon section 4 of the Prevention of Corruption Act.

Ingredients [§ 174(1)]

A public officer, in the exercise of his or her functions as such, intentionally—

- does anything that is contrary to or inconsistent with his or her duty as a public officer; or
- omits to do anything which it is his or her duty as a public officer to do

for the purpose of showing favour or disfavour to any person.

Presumption [§ 174(2)]

If the prosecution proves that a public officer did or omitted to do anything to the favour or prejudice of any person in breach of his or her duty as a public officer

it will be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person.

When crime not committed [§ 174(3)]

The crime of criminal abuse of duty as a public officer is not committed by a public officer who does or omits to do anything in the exercise of his or her functions as such for the purpose of favouring any person on the grounds of race or gender, if the act or omission arises from the implementation by the public officer of any Government policy aimed at the advancement of persons who have been historically disadvantaged by discriminatory laws or practices.

Penalty [§ 173(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 13</td>
<td>Up to 15 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Competent verdicts on this charge [§ 275 read with 4th Schedule]

- Bribery;
- Theft;
- Extortion;
- Any crime of which a person might be convicted if charged with any of the crimes above.
Crimes Against Law Enforcement and Public Administration

This part of the Code provides for crimes against law enforcement and public administration.

Assaulting peace officer

This re-enacts with amendment s 20 of POSA.

Ingredients

X assaults or violent means resists a peace officer acting in the course of his or her duty, knowing that he or she is a peace officer or realising that there is a risk that he or she is a peace officer.

“Peace officer” includes—

- any magistrate or justice of the peace;
- the Sheriff or any deputy sheriff;
- any police officer;
- any prison officer;
- any immigration officer;
- any inspector of mines;
- any chief, within his or her community; or headman, chief’s messenger or headman’s messenger, within the community of his or her chief, as defined in the Traditional Leaders Act;
- any other person designated by the Minister by notice in a statutory instrument.

Penalty

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 12</td>
<td>Up to 10 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

Undermining police authority

This re-enacts s 21 of POSA.

Ingredients
Physical ingredients | Mental ingredient
---|---
X makes in a public place any statement that is false in a material particular or does any act or thing whatsoever in the presence of a police officer who is present on duty or a police officer who is off duty. | X know that the person is a police officer or realises that there is a risk that the person is a police officer
X intends or realises that there is a risk or possibility of engendering feelings of hostility towards such officer or the Police Force or exposing such officer or the Police Force to contempt, ridicule or disesteem.

X makes in a public place any statement that is false in a material particular or does any act or thing whatsoever, whether or not in the presence of a police officer | X intends or realises that there is a risk or possibility of engendering feelings of hostility towards an officer or the Police Force or exposing an officer or the Police Force to contempt, ridicule or disesteem.

**Penalty**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 7</td>
<td>Up to 2 years</td>
<td>Both</td>
</tr>
</tbody>
</table>

**Obstructing public official, impersonating police officer, peace officer or public official and deliberately supplying false information to public authority**

[ss 178, 179 & 180]

These sections create the new crimes of obstructing a public official, impersonating a police officer, peace officer or public official and deliberately supplying false information to a public authority. Some enactments which provide for the powers of public officials or the rendering of information to a public authority contain provisions criminalising this kind of conduct in relation to the particular officials or authorities mentioned in the enactment concerned. Where such provision exists, a prosecution may be sustained only by reference to the appropriate crimes contained in those enactments.

**Definition** [s 175]

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>advantage</td>
<td>any right, interest, profit, indemnity or advantage of any kind whatsoever which benefits a person, whether lawfully or otherwise, or which the</td>
</tr>
</tbody>
</table>
person believes will so benefit him or her

| corporate body of a public character | ➢ established directly by or under any enactment for special purposes specified in that enactment; or
    | ➢ wholly owned or controlled by the State that discharges statutory functions, including functions specified by or under a licence or other like authority issued in terms of an enactment; |
| public authority | a peace officer, public official, corporate body of a public character or any agency of the State |
| public official | ➢ a person who holds public office or is appointed to perform a public duty; or
    | ➢ any employee or agent of the State or a corporate body of a public character, who is appointed as an inspector or in any other capacity to enforce the provisions of any enactment. |

---

**Obstruction of public official**

[s 178]

*Ingredients [s 178(1)]*

X by physical interference obstructs a public official acting in the lawful execution of his or her duty

*Crime chargeable where obstructs police investigations [s 178(2)]*

Where X is accused of obstructing a police officer investigating the commission of a crime, X must be charged with the crime of defeating or obstructing the course of justice and not obstructing a public official.

*Crime chargeable where obstructs public official acting under an enactment [s 178(3)]*

Where X is accused of obstructing a public official acting under an enactment which makes such obstruction a crime, X person must be charged under that enactment and not obstructing a public official under section 178(1).

*Penalty [s 178(1)]*

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>

---

**Impersonating police officer, peace officer or public official**

[s 179]
Ingredients [s 179(1)]
X, for the purpose of obtaining any advantage, whether for himself or herself or for some other person, impersonates a police officer, peace officer or public official.

Charge under enactment [s 179(2)]
Where X is accused of impersonating a police officer, peace officer or public official acting under an enactment which makes such impersonation a crime, X must be charged under that enactment and not with a contravention of s 179.

Penalty [s 178(1)]

<table>
<thead>
<tr>
<th>Where X impersonated a peace officer or police officer</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine up to level 10</td>
<td>Fine up to level 6</td>
</tr>
<tr>
<td>Prison up to 5 years</td>
<td>Prison up to 1 year.</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>

Deliberately supplying false information to public authority [s 180]

Ingredients [s 180(1)]
X for the purpose of obtaining any advantage, whether for himself or herself or for some other person, supplies any information verbally or in writing to a public authority—

- knowing that the information is false; or
- realising that there is a real risk or possibility that it may be false.

Alternate or concurrent charge of fraud [s 180(3)]
X may be charged concurrently or alternatively with the crime of fraud.

Crime chargeable where other enactment makes such conduct a crime [s 180(2)]
Where X is accused of deliberately supplying false information to a public authority in connection with an enactment which makes such conduct a crime, such person must be charged under that enactment and not with this crime.

Penalty [s 180(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>
Crimes Against the Administration of Justice

Sections 181 to 185 provide for crimes against the administration of justice. Most of the existing common law and statutory crimes against the administration of justice may be classified into those which are related to the subject matter of judicial proceedings and those which are not. Accordingly sections 182 and 184 seek to incorporate these crimes as instances of one of the two crimes of “contempt of court” and “defeating or obstructing the course of justice”. Both crimes may be committed in relation to statutory tribunals exercising judicial or quasi-judicial functions, as well as in relation to the ordinary courts of law.

Definitions [s 181]

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>court</td>
<td>➢ the Supreme Court; ➢ the High Court; ➢ the Administrative Court; ➢ the Labour Court established in terms of section 83 of the Labour Act; ➢ the Fiscal Appeal Court established in terms of section 3 of the Fiscal Appeal Court Act; ➢ the Special Court for Income Tax Appeals established in terms of section 53 of the Income Tax Act; ➢ the Intellectual Property Tribunal established in terms of section 3 of the Intellectual Property Tribunal Act; ➢ a magistrates court established in terms of the Magistrates Court Act; ➢ a local court established in terms of the Customary Law and Local Courts Act; ➢ any other court or tribunal, which is established by or in terms of any enactment and which exercises judicial or quasi-judicial functions.</td>
</tr>
<tr>
<td>escaped person</td>
<td>a person referred to in s 185(1)(a) or (b) who has escaped from lawful custody in contravention of that section.</td>
</tr>
<tr>
<td>judicial proceedings</td>
<td>proceedings of a court, whatever the nature of such proceedings</td>
</tr>
<tr>
<td>oath</td>
<td>➢ an oath lawfully sworn by a person in the course of or for the purpose of judicial proceedings; or ➢ an affirmation lawfully made by a person in lieu of an oath in the course of or for the purpose of judicial proceedings; or ➢ an admonition lawfully administered to a person in lieu of an oath in the course of or for the purpose of judicial proceedings.</td>
</tr>
</tbody>
</table>
**officer of court**
any person who performs official duties in any court or in connection with judicial proceedings, and includes a legal practitioner acting in the course of such duties, but does not include a person whose duties extend only to appearing in court as a witness.

**prison**
has the meaning given to that term in section 2 of the Prisons Act

**reward**
any right, interest, profit, indemnity, benefit or advantage of any kind whatsoever which is not due to the person who receives it.

---

**Contempt of court**

[§ 182]

*Ingredients* [§ 182(1)]

X by an act or omission impairs the dignity, reputation or authority of a court—

intending to do so or realising that there is a real risk that the act or omission may have this effect.

*Acts impairing dignity, reputation or authority of court* [§ 182(1)]

The ways by which X can commit this crime include the following—

- X misbehaves in court;
- X insults a judicial officer or officer of court in the course of judicial proceedings;
  
  (A person can also insult a judicial officer outside the courtroom by making insulting or disparaging remarks about the judicial officer, for instance in a newspaper article. The insult can also be about the judiciary generally as when X makes a generalised statement like all judges in Zimbabwe are corrupt or incompetent.)
- X obstructs, interrupts or disturbs judicial proceedings;
- having been properly summoned as a party or witness in any judicial proceedings to attend any court for the purpose of giving evidence or producing any document or thing before the court —
  - X intentionally or through negligence fails to attend the court in accordance with the summons; or
  - having attended the court, X refuses to give evidence or to produce the document or thing, as the case may be; or
  - X refusing as a witness to answer any question put to him or her which he or she is lawfully required to answer;
- X knowingly contravening or failing to comply with any order of a court which is given during or in respect of judicial proceedings and with which it is X’s duty to comply;
❯ X by words, conduct or demeanour pretends to be an officer of the court;
❯ X issues or publishes to any other person a document that purports to be issued by or emanate from a court, knowing that the document is not issued by or does not emanate from the court concerned;
❯ X publishes evidence that has been given *in camera* or which the court has ordered should not be published.

*Criminal Procedure and Evidence Act provisions*

9A Prosecutions for contempt of court proceedings
(1) A court or tribunal may, on its own motion, institute proceedings for contempt of court against any person who is alleged to have impaired its dignity, reputation or authority in the presence of the court or tribunal.
(2) No court, tribunal or person, other than the Attorney-General or someone acting on the express authority of the Attorney-General, shall institute or continue any proceedings for contempt of court against anyone who is alleged to have impaired the dignity, reputation or authority of a court or tribunal in circumstances other than those referred to in subsection (1).
(3) Nothing in this section shall affect the institution of proceedings for contempt of court against any person for the purpose of enforcing any order of a court or tribunal.

*Comment on impending court case* [s 184(1)(c)]

It used to be the crime of contempt of court if X makes a statement with any case which is pending before a court, intending the statement to prejudice the trial of the case. This will no longer amount to contempt of court but will instead be a species of defeating or obstructing the course of justice.

*Defence* [s 182(3)]

It is a defence to a charge of contempt of court based on an allegation of insulting a judicial officer that the person charged was criticising, fairly, temperately and without malice, the administration of justice, the conduct of a judicial officer, or any decision or proceedings of a court.

*Cases*

In the case of *In re Chinamasa* HH-118-02 the Attorney-General made highly critical and intemperate remarks following the passing of sentence in a criminal case. The judge ordered that proceedings be taken against him for contempt of court. The High Court held that the Attorney-General genuinely believed the sentence to be unreasonable or inordinately lenient. However, the terms used were not within the bounds of reasonable courtesy. What brought the statement within the ambit of contempt was the respondent’s intention and lack of good faith. The remarks were intended to bring the judge into disrepute as a judge and the administration of justice by the High Court into disrepute. The Attorney-General’s contempt was compounded by his deliberate and contemptuous response to the authority and process of the court to the hearing of the contempt indictment against him and to the warrant of arrest issued against him when he failed to appear at the hearing. He made no attempt to explain why he did not respond to the notice setting the original contempt indictment down for hearing. He made no effort to deal with the warrant of
arrest that he knew has been issued. He deliberately scorned and avoided the processes and directives of the court. His only response to the authority of the court was abuse and threats. The judgment was, however, later set aside on the basis of procedural irregularities.

The species of contempt known as contempt of court is constitutional although it does impose restrictions on freedom of speech.

In the case of In re: Chinamasa 2000 (2) ZLR 322 (S) the Zimbabwe Supreme Court decided the crime of contempt of court in the form of scandalising the court is not unconstitutional. Although the courts play a key democratic role in a democratic society and are bound to be criticised, and the courts are strong enough to withstand criticism, criticism imputing improper or corrupt motives or conduct does create a real or substantial risk of impairing public confidence in the administration of justice and some limitation on the right of free speech in relation to the courts is justifiable. Although this offence restricts freedom of expression, the limitation imposed upon this right is reasonably justifiable in a democratic society. It does not excessively limit the right of free speech as the offence is narrowly defined. The Supreme Court did, however, acknowledge that it is not always easy to draw the line between impermissibly scandalising the court and engaging in what is fair and legitimate criticism of the courts.

In the South African case of S v Mamabolo 2001 (3) SA 409 (CC) the Constitutional Court held that although crime of scandalising the court did limit freedom of expression, provided the crime was appropriately narrowly defined, the limitation was reasonable and justifiable in an open and democratic society in order to preserve confidence in the administration of justice. The court noted that many such societies have this power for this purpose. It held that freedom of expression must be weighed against public confidence in the courts.

**Penalty** [s 182(1)]

<table>
<thead>
<tr>
<th></th>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Up to level 6</td>
<td>Up to 1 year</td>
<td>Both</td>
</tr>
</tbody>
</table>

See *Guide* pp 77-78 and 187-188.

**Perjury** [s 183]

**Ingredients** s 183(1)]

In the course of or for the purpose of judicial proceedings, X makes a false statement upon oath, whether the statement is written or oral—

knowing that the statement is false or realising that there is real risk it may be false.
“oath” means

- an oath lawfully sworn by a person in the course of or for the purpose of judicial proceedings; or
- an affirmation lawfully made by a person in lieu of an oath in the course of or for the purpose of judicial proceedings; or
- an admonition lawfully administered to a person in lieu of an oath in the course of or for the purpose of judicial proceedings.

A statement may be false by reason of the omission of facts as well as by the assertion of untrue or incorrect facts.

Where the false statement is made in the course of or for the purpose of judicial proceedings but the statement is not made upon oath, the correct charge is defeating or obstructing the course of justice. [s 184(1)(d) as read with s 184(3)].

A false statement made in a sworn affidavit to be produced during court proceedings could constitute perjury as it is made under oath lawfully sworn by a person for the purpose of judicial proceedings.

Under s 10 of the Justices of the Peace and Commissioners of Oaths Act [Chapter 7:09] it is a criminal offence to make a false statement in a sworn affidavit. The section reads as follows—

10 (1) Any person who in an affidavit made before a person competent in terms of this Act to administer an oath makes a statement which he knows to be false in any particular or which he does not know or believe to be true shall be guilty of an offence and liable to the a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

**Immaterial matters [s 183(2)]**

The crime of perjury is still committed even though—

- the judicial proceedings concerned are held or will be held before a court that is not properly constituted or that lacks jurisdiction to entertain the proceedings; or
- the person who makes the false statement is not a competent witness in the judicial proceedings concerned; or
- the statement is irrelevant to or inadmissible as evidence in the judicial proceedings concerned.

**Presumption where conflicting statements [s 183(3)]**

This re-enacts section 150 (3) of the Criminal Procedure and Evidence Act.

<table>
<thead>
<tr>
<th>Facts leading to presumption</th>
<th>Presumption</th>
</tr>
</thead>
</table>
| X makes a statement upon oath and thereafter, upon the same or another oath, makes another statement which is in substantial conflict with the first statement | It will be presumed in any proceedings for perjury in respect of these statements that—
| | - the person made a false statement, whether or not either statement has |
actually been proved to have been false; and

➤ the person knew the falsity of the statement.

unless the person proves that when he or she made each statement he or she genuinely believed that it was true.

Subornation of perjury no longer chargeable

Under the common law there was a separate offence known as subornation of perjury. This common law crime of subornation of perjury has been abolished. Instead if X incites Y to commit perjury X will be charged with incitement to perjury or, if the incitement succeeds, and Y gives actually false testimony, X will be charged as an accomplice to the perjury committed by Y.

Penalty [s 183(1)]

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 10</td>
<td>Up to 5 years</td>
<td>Both</td>
</tr>
</tbody>
</table>


---

Defeating or obstructing the course of justice

[s 184]

Ingredients [s 184(1)]

Relating to judicial proceedings

➤ By any act or omission, X causes judicial proceedings to be defeated or obstructed, intending to defeat or obstruct the proceedings or realising that there is a real risk or possibility that the proceedings may be defeated or obstructed; or

➤ In the course of or for the purposes of judicial proceedings X makes a false statement otherwise than upon oath, whether the statement is written or oral, knowing that the statement is false or realising that there is a real risk or possibility that the statement may be false. (This re-enacts and modifies section 150 (1) of the Criminal Procedure and Evidence Act. Note that if the false statement is made under oath, which is defined to include affirmations and admonitions, the correct charge is perjury); or

➤ X makes any statement, whether written or oral, in connection with any case which is pending before a court, intending the statement to prejudice the trial of the case, or
realising that there is a real risk or possibility that the trial of the case may be prejudiced by the statement. (This was previously treated as a sub-species of contempt of court.); or

- By any act or omission X intentionally hinders or obstructs another person whom he or she knows to be an officer of court in the performance of his or her duties as such (This re-enacts and modifies section 6 (f) of the Miscellaneous Offences Act)

Judicial proceedings can be defeated in various ways including when an innocent person is convicted or a guilty person escapes conviction or a plaintiff or applicant unjustly succeeds or a defendant or respondent unjustly fails to succeed. [s 184(2(a))]

Judicial proceedings can be obstructed in various ways including when the judicial proceedings are impeded or interfered with in any way. [s 184(2(b))]

*In relation to police investigations*

- X resists, hinders or disturbs a police officer in the execution of his or her duty, knowing that the police officer is a police officer executing his or her duty or realising that there is a real risk or possibility that the police officer may be a police officer executing his or her duty; or

- X knowing that a police officer is investigating the commission of a crime, or realising that there is a real risk or possibility that a police officer may be investigating the commission or suspected commission of a crime, and who, by any act or omission, causes such investigation to be defeated or obstructed, intending to defeat or obstruct the investigation or realising that there is a real risk or possibility that the investigation may be defeated or obstructed; or

- X makes a statement to a police officer falsely alleging that a crime has been committed or may have been committed, knowing that the allegation is false or realising that there is a real risk or possibility that it may be false (This re-enacts section 11 of the Miscellaneous Offences Act); or

- X intentionally agrees with another person that, in return for a reward, he or she will not report to a police officer the commission of a crime. (This used to constitute the separate common law crime of compounding.)

Investigations of any crime can be obstructed in various ways including when the investigations are impeded or interfered with in any way. [s 184(2(b))]

*False statement otherwise than on oath* [s 184(1) d) read with s 184(3)]

Where X in the course of or for the purposes of judicial proceedings makes a false statement otherwise than upon oath, whether the statement is written or oral, knowing that the statement is false or realising that there is a real risk or possibility that the statement may be false X will be guilty of defeating or obstructing the course of justice.

*Accused person refusing to make statement to police* [s 184(4)]

If a person who has committed or is suspected of having committed a crime refuses to make a statement or point out anything to a police officer, that refusal will not constitute the crime of defeating or obstructing the course of justice. A person accused of a crime has a privilege against
self-incrimination. Thus a person has the right to refuse to incriminate himself or herself and such refusal cannot amount to the crime of defeating or obstructing the course of justice.

Penalty [s 184(1)]

<table>
<thead>
<tr>
<th>Species of defeating or obstructing</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ causing judicial proceedings to be defeated or obstructed</td>
<td>Fine up to level 10</td>
</tr>
<tr>
<td>➢ making false statement otherwise than on oath in course or for purposes of judicial proceedings</td>
<td>Prison up to 5 years</td>
</tr>
<tr>
<td>➢ knowing that a police officer is investigating the commission of a crime, does something that causes the investigation to be defeated or obstructed</td>
<td>Both.</td>
</tr>
<tr>
<td>➢ making a statement to a police officer falsely alleging that a crime has been</td>
<td>Fine up to level 7</td>
</tr>
<tr>
<td>➢ resisting, hindering or disturbing a police officer in the execution of his or her duty,</td>
<td>Prison up to 2 years</td>
</tr>
<tr>
<td>➢ intentionally hindering or obstructing another person whom he or she knows to be an officer of court in the performance of his or her duties.</td>
<td>Both.</td>
</tr>
<tr>
<td>➢ making a statement in connection with any case which is pending before a court, intending to prejudice the trial of the case</td>
<td>Fine up to level 6</td>
</tr>
<tr>
<td>➢ intentionally agreeing with another person that, in return for a reward, he or she will not report to a police officer the commission of a crime.</td>
<td>Prison up to 1 year</td>
</tr>
</tbody>
</table>

Cases

In *S v Ncube* HB-27-85 X gave false information to police as to whereabouts of person who was the subject of a warrant of arrest. He was found guilty of attempt to defeat course of justice.

In *S v Jabangwe* S-25-89 a court interpreter, X, tried to induce a State witness to give false evidence which would have resulted in the State having to withdraw charges against a person charged with supplying dagga. The witness reported the matter to the police. X was found guilty of attempt.
In *S v Moono* HB-45-90 when on remand on criminal charge X paid fellow prisoner to take responsibility for X’s crime. X was then released and his friend was tried and sent to prison. The deception was subsequently discovered. X was found guilty.

In *S v Fadika* HH-83-93 a woman tried to help her boyfriend by raising money for bribing a police officer and by trying to substitute bicarbonate of soda for the kilo of cocaine he was found with. She was found guilty.

In *S v Makahamadze* HH-97-92 an unlicenced driver, Y, stopped by the police at a road block gave X’s particulars as his own and X then went to the police station and produced his licence to cover for his friend's offence. The court held that the offence of obstructing the course of justice was completed, not just an attempted, even though the falsehood was discovered.

In *S v Williams* S-10-94 the police came to X's home looking for X’s friend in connection with criminal investigations. X falsely denied that he was in the house. This allowed friend time to escape through window. He was found guilty.

See *Guide* 85-86 and 203-204.

---

**Escaping from lawful custody**

[s 185]

This section extracts, combines and expands upon s 44 of the Criminal Procedure and Evidence Act and Part XVI of the Prisons Act.

**Ingredients** [s 185(1)]

X escapes or attempts to escape from such custody after X has been lawfully arrested and held in lawful custody and has been lodged in prison or had not yet been lodged in prison.

<table>
<thead>
<tr>
<th>Facts</th>
<th>Presumption</th>
</tr>
</thead>
</table>
| X conveyed any thing which may facilitate the escape of a person from lawful custody—  
  ➢ to the person held in lawful custody; or  
  ➢ into a conveyance, prison, hospital or other place whatsoever where or in which the person held in lawful custody may be, or outside such conveyance, prison, hospital or other place whatsoever in which such person may be so that it may come into his or her possession or use; | Presumed unless the contrary is proved that he or she did so in the course of securing the escape from lawful custody of the person so held. |
**Penalty** [s 185(1), (2) and (3)]

<table>
<thead>
<tr>
<th>Committed in aggravating circumstances</th>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where person not yet lodged in prison</td>
<td>Where person not yet been lodged in prison</td>
</tr>
<tr>
<td>Fine up to level 11</td>
<td>Fine up to level 10</td>
</tr>
<tr>
<td>Prison up to 7 years</td>
<td>Prison up to 5 years</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>

Where person lodged in prison

<table>
<thead>
<tr>
<th>Other cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prison up to 10 years.</td>
</tr>
</tbody>
</table>

Aggravating circumstance–
if any weapon or violence was used by a person charged with escaping from lawful custody.

<table>
<thead>
<tr>
<th>Accomplice</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>An accomplice who secures another person’s escape from lawful custody or otherwise aids that person in escaping or attempting to escape</td>
<td>Where person assisted not yet lodged in prison</td>
</tr>
<tr>
<td>Where person assisted not yet lodged in prison</td>
<td>Fine up to level 11</td>
</tr>
<tr>
<td>Where person assisted lodged in prison</td>
<td>Fine up to level 10</td>
</tr>
<tr>
<td>Where person assisted lodged in prison</td>
<td>Prison up to 5 years</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Accessory</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>X charged as an accessory to the crime of escaping from lawful custody, in that X employed, or harboured or concealed or assisted in harbouring or concealing an</td>
<td>Fine up to level 6</td>
</tr>
<tr>
<td>Where person assisted not yet lodged in prison</td>
<td>Fine up to level 10</td>
</tr>
<tr>
<td>Where person assisted lodged in prison</td>
<td>Prison up to 5 years</td>
</tr>
<tr>
<td>Both.</td>
<td>Both.</td>
</tr>
</tbody>
</table>
A person who escapes or attempts to escape from lawful custody after being lodged in a prison may be charged alternatively or concurrently in terms of s 90 of the Prisons Act.
Unfinalised Crimes; Threats, Incitement, Conspiracy and Attempt

Sections 186 to 194 deal with “unfinalised” crimes, commonly also known as “preliminary” or “inchoate” crimes. These are crimes in their own right if the act threatened, incited, conspired or attempted would, if carried out, itself constitute a substantive crime.

Threatening commit a serious crime [s 186]

This for the first time makes punishable any threat to commit certain specified crimes (although some existing crimes are constituted by threats— for example, a person who threatens to assault someone can be presently be charged with common assault). Such a threat is a crime if the accused threatens to commit a serious crime (such as murder, rape, kidnapping or other crime specified in the clause) and he or she intended to commit the crime concerned, or intended to inspire or realised that there was a real risk of inspiring in the person threatened a reasonable fear or belief that the accused would commit the crime concerned.

Ingredients [s 186(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>By words, writing or conduct</td>
<td>When X made this threat</td>
</tr>
<tr>
<td>X threatens to commit against another any of the following crimes</td>
<td>- X intended to commit the crime concerned or to inspire in the person threatened a reasonable fear or belief that X would commit the crime; or</td>
</tr>
<tr>
<td>murder, rape, aggravated indecent assault, indecent assault, kidnapping or unlawful detention, theft, robbery, unlawful entry into premises, malicious damage to property [186(3)] and by making such threat X inspire in the person to whom X communicated the threat a reasonable fear or belief that X will commit the crime.</td>
<td>- X realised that there was a real risk of inspiring in the person threatened a reasonable fear or belief that X would commit the crime.</td>
</tr>
</tbody>
</table>

This crime is committed whether or not the person against whom the threat is made is the person to whom the threat is communicated or is some other person.[s 186(2)]

No defence that crime physically impossible to commit [s 190]
It is not a defence that X believed, due to a mistake of fact, that it was physically possible to commit the crime threatened, whereas in fact its commission was physically impossible.

**Defences applicable [s 193(2)]**

X may raise or rely on any complete or partial defence which X could have raised and relied on if X had been charged with committing the crime itself, to the extent that the defence relates to or is based on any fact or circumstance which is an essential element of both the crime and the threat.

**Presumptions, jurisdiction, powers [s 193]**

The same presumptions, jurisdiction and powers as are applicable in relation to completed crimes, whether under the Code or any other enactment apply to threatening to commit a crime.

The matters that will be applied equally to completed and unfinalised crimes are—

- a presumption that applies;
- the jurisdiction that may be exercised;
- an award or order that may be made;
- the power to enter, inspect, arrest, search, detain, seize or eject that may be exercised;
- the power to take a deposit by way of a penalty that may be exercised.

**Penalty [s 186(1)]**

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison</th>
<th>Both</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to level 5</td>
<td>Up to 6 months</td>
<td>Both</td>
</tr>
</tbody>
</table>

---

**Incitement [s 187]**

This restates the existing law on incitement to commit a crime.

**Ingredients [s 187(1)]**

X, in any manner, communicates with another person—

- intending by the communication to persuade or induce the other person to commit a crime, whether in terms of this Code or any other enactment; or
- realising that there is a real risk or possibility that the other person may be persuaded or induced by the communication to commit a crime, whether in terms of this Code or any other enactment;

**Immaterial facts [s 187(2)]**

It is immaterial to a charge of incitement that—

- the person who was incited was unresponsive to the incitement and had no intention of acting on the incitement; or
the person who was incited did not know that what he or she was being incited to do or omit to do constituted a crime.

**Crimes such as treason** [s 194]

Where a crime, such as treason, is committed by incitement, X will be guilty of the completed crime and not merely for incitement.

**No defence that crime physically impossible to commit** [s 190]

It is not a defence that X believed, due to a mistake of fact, that it was physically possible to commit the crime incited, whereas in fact its commission was physically impossible.

**Defences applicable** [s 193(2)]

X may raise or rely on any complete or partial defence which X could have raised and relied on if X had been charged with committing the crime itself, to the extent that the defence relates to or is based on any fact or circumstance which is an essential element of both the crime and the incitement.

**One person inside Zimbabwe and one outside Zimbabwe** [s 191]

If X who is in Zimbabwe incites Y who is outside Zimbabwe to commit a crime in Zimbabwe; or If X outside Zimbabwe incites Y in Zimbabwe to commit a crime in Zimbabwe; X may be charged with incitement to commit the crime concerned.

**Both parties outside Zimbabwe** [s 191]

If X who is outside Zimbabwe incites Y who is outside Zimbabwe to commit a crime in Zimbabwe, X and Y or both may be charged with incitement to commit the crime if as a result of the incitement X or Y or both enter Zimbabwe in order to commit the crime.

**Presumptions, jurisdiction, powers** [s 193]

The same presumptions, jurisdiction and powers as are applicable in relation to completed crimes, whether under the Code or any other enactment apply to incitement.

The matters that will be applied equally to completed and unfinalised crimes are–

- a presumption that applies;
- the jurisdiction that may be exercised;
- an award or order that may be made;
- the power to enter, inspect, arrest, search, detain, seize or eject that may be exercised;
- the power to take a deposit by way of a penalty that may be exercised.

**Penalty** [s 192]

Liable to same punishment to which he or she would have been liable had he or she actually committed the crime concerned the completed crime.
In practice, however, it is extremely rare for attempt to attract the same penalty as the completed crime.


---

**Conspiracy**

[s 188]

This restates the existing law on conspiracy to commit a crime.

**Ingredients** [s 188(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X enters into an agreement with one or more other persons for the commission of a crime, whether in terms of this Code or any other enactment</td>
<td>X intends by the agreement to bring about the commission of the crime; or X realises that there is a real risk or possibility that the agreement may bring about the commission of the crime.</td>
</tr>
</tbody>
</table>

For an agreement to constitute a conspiracy it is not necessary for the parties—

- to agree upon the time, manner and circumstances in which the crime which is the subject of the conspiracy is to be committed; or
- to know the identity of every other party to the conspiracy.

[s 188(2)(a)]

**Immaterial facts** [s 188(2)(b)]

It is immaterial that—

- the crime which is the subject of the conspiracy is to be committed by one, both or all of the parties to the agreement; or
- one or more of the parties to the conspiracy, other than the accused, did not know that the subject-matter of the agreement was the commission of a crime.

**Withdrawal from conspiracy**

In S v Stanley 2010 (1) ZLR 380 (H) the courts said “Conspiracy” may be defined as the act of conspiring; combination for unlawful purpose, plot. A conspirator is one engaged in a conspiracy.
In general a conspirator is liable for the crime perpetrated by his co-conspirators. But where he has effectively withdrawn from the conspiracy, he does not remain liable for the commission of any subsequent criminal acts. The terms “withdrawal” and “dissociation”, which are often used in this context of the law, refer to a voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy. The reason for allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered. The actual role of the conspirator will determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner, something further than a communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required.

*Crimes such as treason [s 194]*

Where a crime, such as treason, is committed by conspiracy, X will be guilty of the completed crime and not merely for conspiracy.

*No defence that crime physically impossible to commit [s 190]*

It is not a defence that X believed, due to a mistake of fact, that it was physically possible to commit the crime they conspired to commit, whereas in fact its commission was physically impossible.

*Defences applicable [s 193(2)]*

X may raise or rely on any complete or partial defence which X could have raised and relied on if X had been charged with committing the crime itself, to the extent that the defence relates to or is based on any fact or circumstance which is an essential element of both the crime and the conspiracy.

*One party inside and one outside Zimbabwe [s 191]*

If X who is in Zimbabwe conspires with Y who is outside Zimbabwe to commit a crime in Zimbabwe; or

If X who is outside Zimbabwe conspires with Y who is in Zimbabwe to commit a crime in Zimbabwe.

Both X and Y may be charged with conspiracy to commit the crime concerned.

*Both parties outside Zimbabwe [s 191]*

If X who is outside Zimbabwe conspires with Y who is outside Zimbabwe to commit a crime in Zimbabwe, X or Y or both may be charged with conspiracy to commit the crime concerned, as the case may be, if, as a result of the conspiracy, either or both persons enter Zimbabwe in order to commit the crime.

*Presumptions, jurisdiction, powers [s 193]*
The same presumptions, jurisdiction and powers as are applicable in relation to completed crimes, whether under the Code or any other enactment apply to conspiracy.

The matters that will be applied equally to completed and unfinalised crimes are:

- a presumption that applies;
- the jurisdiction that may be exercised;
- an award or order that may be made;
- the power to enter, inspect, arrest, search, detain, seize or eject that may be exercised;
- the power to take a deposit by way of a penalty that may be exercised.

**Penalty** [s 192]

Liable to same punishment to which he or she would have been liable had he or she actually committed the crime concerned the completed crime.

In practice, however, it is extremely rare for conspiracy to attract the same penalty as the completed crime.

*See Guide* pp 53-54 and 173.

---

**Attempt**  
[s 189]

**Ingredients** [s 189(1)]

<table>
<thead>
<tr>
<th>Physical ingredients</th>
<th>Mental ingredient</th>
</tr>
</thead>
<tbody>
<tr>
<td>X does or omits to do anything that has reached at least the commencement of the execution of the intended crime</td>
<td>X intends to commit a crime, whether in terms of this Code or any other enactment; or realising that there is a real risk that a crime, whether in terms of this Code or any other enactment, may be committed.</td>
</tr>
</tbody>
</table>

**Comment**

The Explanatory Memorandum to the Bill says this about the re-formulated crime of attempt—

“... with respect to ‘uncompleted’ attempts, in which the accused fails to complete all the preparatory steps to the crime because he or she desists or is prevented from doing so, there is uncertainty over what test is to be applied to determine whether the crime has been “attempted”. Some cases apply a purely objective test and enquire how far the accused had gone towards achieving his or her criminal design. Other cases apply a more subjective test and ask whether, having regard to the accused’s overt acts, he or she intended to complete his or her design irrespective of how close he or she was to achieving it. Neither test, on its own, gives any weight to the gravity of the crime attempted, nor to the aggravating circumstances under...
which any crime may have been attempted. In such cases, the public interest may demand that even the most preparatory steps should be punished as an attempt, regardless of whether the accused intended to complete his or her design and of how far he or she had progressed towards its execution. On the other hand, it is also in the public interest that any person contemplating a crime should be given every encouragement to desist from proceeding with it. To balance these competing interests, the approach adopted by this clause is that if the accused voluntarily desisted from his or her criminal purpose before the commencement of its execution, he or she will escape liability for attempting to commit the proposed crime.”

The phrase “commencement of the execution of the crime” will have to be interpreted by the courts. Clearly X does not have to be in the final stages of carrying out the criminal enterprise to satisfy this test. (He does not have “commenced the consummation of the crime”).

The drafters of the Code originally proposed that if it could be proved that X intended to commit a crime he would be guilty of attempt even if he had taken only a preparatory step towards the implementation of his criminal purpose, provided it could be proved that he took that step seriously intending to carry out his criminal purpose.

e.g. X goes to store and buys tin of rat poison intending that evening to place it in wife’s porridge and kill his wife. Usually this plan would not be provable as it is simply an idea in the mind of X and no one else knows about the plan. But the plan might be provable if X tells another person that he cannot stand his wife any more and is definitely going to poison her that evening. What then would happen if the police go to X’s house and arrest him before he can put the poison in her porridge and X is charged with attempted murder? The problem with making such preparatory acts punishable, however, is that X might well have changed his mind and decided not to poison his wife.

However, the test adopted for uncompleted attempts is that of commencement of the execution of the plan. This formulation was taken from Professor Snyman and Snyman in his book makes it clear that mere preparatory acts will not amount to attempt using this test.

As things stand at the moment the adoption of the test commencement of execution means that the courts will still have differentiate between preparatory acts (which will not amount to attempt) and acts done after X has started to implement the criminal plan (which will amount to criminal attempt.)

Judges and magistrates will simply have to use their common sense in trying to draw the line between the two.

**Acts of mere preparation**

X illegally procures a firearm with the intention at some later stage of committing a robbery. He is not guilty of attempted murder. However if three criminals conspire to commit robbery and go out and procure weapons to use the next day in the robbery, they can obviously be charged with conspiracy to commit robbery.
X goes out and buys a tin of petrol intending that evening to use the petrol to set fire to someone else’s house. He is not guilty of attempted arson.

X intends to break into a car and hotwire the car so he can steal it. He has a screwdriver to force open the lock to the car door. He is next to the car shining a torch onto the lock and is about to insert the screwdriver into the keyhole when he is arrested by the police. He is not guilty of attempted theft of a car.

**Acts that have reached stage of commencement of execution of crime**

**Clear cut cases where in last stages of committing crime**

X, an arsonist, pours petrol on building and is about to set fire to building when stopped by police.

X puts poison in wife’s porridge but before wife can eat porridge domestic worker who has seen X inserting the poison warns woman and she does not eat porridge.

X enters another’s house intending to steal – taken items from cupboard and piled them on floor intending to take away when interrupted by house owner and runs away but is apprehended by police.

**Less clear cut cases**

If X, Y and Z conspire to rob a bank and Z turns informer and informs the police about the plan and the police stop the car of X and Y when it is on the way to bank and find the weapons in the car that they were intending to use in the robbery. Can it be said that they have commenced the execution of the enterprise or is what they have done mere preparation? Again the alternative here is simply to charge with conspiracy to rob?

X tells people that he is going to kill Y. X takes a firearm and is proceeding towards Y’s house and the police arrest him before he gets to the house? Is he guilty of attempted murder?

*Crimes such as treason [s 194]*

Where a crime, such as treason, is committed by attempt, X will be guilty of the completed crime and not merely for attempt.

*No defence that crime physically impossible to commit [s 190]*

It is not a defence that X believed, due to a mistake of fact, that it was physically possible to commit the crime attempted, whereas in fact its commission was physically impossible.

*Defences applicable [s 193(2)]*
X may raise or rely on any complete or partial defence which X could have raised and relied on if X had been charged with committing the crime itself, to the extent that the defence relates to or is based on any fact or circumstance which is an essential element of both the crime and the attempt.

Voluntarily desisting before commencement of execution [s 189(2)]
X is not be guilty of attempting to commit a crime if, before the commencement of the execution of the intended crime, X changes his or her mind and voluntarily desists from proceeding further with the crime.

Presumptions, jurisdiction, powers [s 193]
The same presumptions, jurisdiction and powers as are applicable in relation to completed crimes, whether under the Code or any other enactment apply to attempt.
The matters that will be applied equally to completed and unfinalised crimes are–

- a presumption that applies;
- the jurisdiction that may be exercised;
- an award or order that may be made;
- the power to enter, inspect, arrest, search, detain, seize or eject that may be exercised;
- the power to take a deposit by way of a penalty that may be exercised.

Penalty [s 192]
Liable to same punishment to which he or she would have been liable had he or she actually committed the crime concerned the completed crime.

In practice, however, it is extremely rare for attempt to attract the same penalty as the completed crime.

See Guide 45-55 and 173-174

(But note that the section in the Guide dealing with uncompleted attempts is no longer directly applicable as the Code has established a new test for such attempts.)
Participation or Assistance in Commission of Crimes

Sections 195 to 204 provide for the criminal liability of persons who participate or assist before or during the commission of crimes. In the existing law there is some lack of clarity in the terminology used to describe the varying degrees of participation in a crime before or during its commission. The common law phrase “socius criminis” describes both an “associate” (as opposed to a “principal” or “actual” perpetrator of a crime), and an “accomplice” properly so called.

No practical purpose is served by the distinction between “principal” and “associate” perpetrators where they are associated with each other for the common goal or purpose of committing the crime and are present at the actual commission of the crime. Thus s 196 practically abolishes this distinction by rendering liable every joint or associate perpetrator (“co-perpetrator”) as if he or she was the actual perpetrator.

The person who renders assistance to the actual perpetrator after the crime has been committed will be guilty as an accessory to the perpetrator’s crime.

The Code thus divides those who participate or assist in criminal activity into the following categories—

<table>
<thead>
<tr>
<th>Actual perpetrator</th>
<th>Commits crime himself or herself with requisite intent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Co-perpetrator</td>
<td>Is present and assists when actual perpetrator commits crime and who knowingly associated with the actual perpetrator with the intention that the crime actually committed will be committed.</td>
</tr>
<tr>
<td>Accomplice</td>
<td>Is not present when crime committed but has previously rendered assistance to actual perpetrator</td>
</tr>
<tr>
<td>Accessory</td>
<td>Renders assistance to actual perpetrator after crime committed</td>
</tr>
</tbody>
</table>

Actual perpetrator

[s 195]

Section 195 defines the actual perpetrator of a crime as a person who, with the requisite state of mind, actually does, completes or omits to do anything the doing, completion or omission of which constitutes that crime.
Co-perpetrators

Section 196 deals with co-perpetrators.

When person is co-perpetrator

A co-perpetrator is a person other than the actual perpetrator

- who was present with the actual perpetrator during the commission of the crime; and
- who knowingly associated with the actual perpetrator (and any other co-perpetrators) with the intention that each or any of them will commit or be prepared to commit the crime actually committed.

Where these requirements have been satisfied, the conduct of the actual perpetrator will be deemed also to be the conduct of every co-perpetrator.

To be a co-perpetrator the person must have been physically present with the actual perpetrator when the actual perpetrator was committing the crime and must have knowingly associated with the crime committed.

According to Snyman a person cannot be a co-perpetrator to a crime that can only be committed through the instrumentality of that person’s own body. (Criminal Law 4th Edition p 266) Thus he says, if X holds down a woman whilst his friend rapes her, X can only be guilty as an accomplice. On this point he cites the case of S v Gaseb 2001 1 SACR 438 (NmS) 452a-d.

Direct contribution to commission of crime unnecessary

A person can be guilty as a co-perpetrator whether or not he or she contributed directly in any way to the commission of the crime by the actual perpetrator.

Prior conspiracy unnecessary

There does not have to be a prior conspiracy with the actual perpetrator for a person to be guilty as a co-perpetrator. In other words, the co-perpetrator form a common purpose with the actual perpetrator by joining in a crime before it is committed and without having conspired with the actual perpetrator in advance to commit this crime.

Presumption

A presumption applies where two or more persons—

- have associated together in any conduct that is preparatory to the conduct which resulted in the crime with which they are charged; or
- have engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime with which they have been charged;

and the persons were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime.

Where all these features are present, unless they prove the contrary on a balance of probabilities, each of the 2 or more persons are present,
➢ will be presumed to have knowingly associated with each other for a criminal purpose and

➢ will also be presumed to have associated with each other to commit the crime that was actually committed or, if it was not the specific crime that they had associated with one another to commit, it will be presumed that each person realised that there was a real risk that the crime actually committed would be so committed.

If any of these persons fail to rebut this presumption by discharging the onus cast upon him or her, he or she will be liable to be punished as if he was the principal offender.

In other words a person present at the scene of the crime in circumstances that implicate him or her directly or indirectly in the commission of the crime with which he or she is charged can only rebut this presumption if that person can prove on a balance of probabilities that he or she did not associate with the others for a criminal purpose or he or she did not associate to commit the crime that was actually committed and did not even realise that the crime would be committed.

Unnecessary for actual perpetrator to be identified

A person can be convicted as a co-perpetrator even if the actual perpetrator has not been identified.

In S v Chauke & Anor 2000 (2) ZLR 494 (S) the Supreme Court made it clear that in where a criminal group acts with a common purpose all members of the group can be liable for a crime committed that fell within the common purpose and it is unnecessary to prove which member of the group actually perpetrated that crime. Thus if a murder is committed, it is not necessary to prove which member of the gang carried out the murder. All members of the gang are liable for murder, provided that the murder fell within the common purpose.

Murder [s 196(8)]

X cannot be convicted as a co-perpetrator of murder unless X was present with the actual perpetrator while the victim was still alive and before a mortal wound or mortal wounds had been inflicted.

However, X can be liable for murder if, after a mortal wound has been inflicted, he joins in a murderous attack and by X’s own actions X expedites the death. See s 58 of Code.

Alternative basis of conviction [s 196(8)]

A person charged as a co-perpetrator to a crime may instead be found guilty of assisting the actual perpetrator as an accomplice or accessory if such liability is proved.

Punishment [s 196(3)(a)]

The co-perpetrator of a crime is guilty of that crime as if he or she was the actual perpetrator and will be sentenced to the same sentence as the actual perpetrator unless he or she satisfies the court that there are special circumstances peculiar to him or her or to the case why that penalty should not be imposed. (The court must record those special circumstances.)

See Guide pp 46-50 and 165-171

(But note that some aspects of the law that applied previously have been modified by the Code.)
Accomplices

Persons who participate in a crime without being present when it is actually committed, that is, by inciting, conspiring with, or authorising or assisting the actual perpetrator before or during the commission of the crime, are termed “accomplices”.

When person is an accomplice [s 195]

Section 195 provides that X is an accomplice if X is not the actual perpetrator and X does any of the following—

- X incites or conspires with Y to commit a crime, with the result that Y commits the crime;
- X, knowing or realising that Y intends to commit the crime, authorises Y to commit the crime when X has lawful or unlawful authority over Y;
- X, knowing or realising that Y intends to commit a crime, renders any form of assistance to Y which enables, assists or encourages Y to commit the crime.

Accomplice unaware of nature of crime [s 197(2)(b)]

X can be liable as an accomplice even if X is only aware that the actual perpetrator’s conduct is unlawful but does not know the nature of the crime or the manner in which it is committed.

Actual perpetrator unaware of assistance [s 197(2)(c)]

X can be liable as an accomplice even if the actual perpetrator is unaware of the assistance rendered by X.

Person lacking ability or capacity to commit crime [s 197(2)(a)]

A person can be held liable as an accomplice to a crime that he or she would not be able to commit as an actual perpetrator or co-perpetrator. Thus a woman cannot commit the crime of rape as an actual perpetrator as the crime is defined in such a way that only a man can commit this crime. However, if a woman assists a man to rape a woman by, for instance, holding the woman down whilst she is raped, the woman who assisted in the rape can be found liable as an accomplice to rape.

Effect of actual perpetrator having defence [s 197(3)]

What is the effect on the accomplice’s liability if the actual perpetrator has a complete or partial defence? The Code provides that accomplice will still be liable for the crime as if he or she was an actual perpetrator of the crime and will not be able to rely upon the defence raised by the actual perpetrator unless the accomplice himself or herself would have been able to have relied upon this defence if he or she had been charged as the actual perpetrator of the crime.

Types of assistance [s 198]
This provides a non-exhaustive list of the forms of assistance given to the actual perpetrator, may render a person liable as an accomplice—

- supplying the means to commit the crime; or
- supplying transport to enable the actual perpetrator to reach the scene of the crime;
- supplying information to enable the actual perpetrator to locate or identify his or her victim or to acquire knowledge of the place where the crime is to be committed;
- making premises of which the assister is the owner or occupier available for the commission of the crime;
- holding oneself available to give assistance in the commission of the crime, in the event of such assistance being required;
- immobilising or incapacitating the victim of the crime to enable the crime to be committed;
- carrying implements or other things by which or with the aid of which the crime is committed;
- keeping watch for or guarding against intervention or discovery while the crime is being committed.

*Crime for which accomplice is liable [s 197(1)]*

An accomplice is guilty of the same crime as that committed by the actual perpetrator.

*Liability for further crimes [s 199]*

This section deals with what happens when the actual perpetrator commits a crime different from or additional to the crime intended by the accomplice when he or she incited, conspired with, authorised or assisted the actual perpetrator.

This section provides that the accomplice is liable for this different or additional crime only if the accomplice realised that there was a real possibility that the actual perpetrator might commit this different or additional crime.

*Withdrawal [s 200]*

The accomplice will not be liable for the crime committed by the actual perpetrator if, before the crime is committed, the accomplice voluntarily desists from further incitement of, conspiracy with, or authorisation of or assistance to the actual perpetrator and he or she also does one of two further things—

- renders wholly ineffective his or her previous actions; or
- gives warning of the crime to a police officer or other person with authority to prevent the commission of the crime in sufficient time to enable that person to prevent its commission.

This provision seems to make it an invariable rule that the person who has been complicit in a criminal enterprise can only escape liability for the crime committed by is or her fellow criminals if he voluntarily desists from further involvement and either renders wholly ineffective his or her previous actions or gives timely warning of the impending crime to enable it to be prevented.
As regards rendering the previous actions wholly ineffective, X who has supplied weapons for a criminal enterprise could render his or her actions wholly ineffective by retrieving all the weapons he or she has supplied. But if X tries to take back the weapons but the other criminals refuse to surrender them, then presumably has not rendered his or her previous actions wholly ineffective and would still be liable for the crime committed by the fellow criminals using those weapons if he or she failed to give warning of the planned criminal enterprise in time to allow the enterprise to be prevented.

In the South African case of Nzo & Anor 1990 (3) SA 1 (A) X escaped liability for murder on the basis that he had given timely warning to the police. In that case there has been a common purpose to kill D. Before D was murdered X revealed everything to the police about his and colleagues activities when they were stopped by the police to check their identification papers. The court held that X was not guilty of murder.

Prior to the Code the courts did not adopt such an absolutist approach to withdrawal. In the case of S v Beahan 1991 (2) ZLR 98 (S) case the Zimbabwean Supreme Court differentiated between two types of cases, namely

- A has merely conspired to commit a crime but has not commenced any overt act towards the successful completion of that crime; and
- A has actually participated in the crime in a more substantial manner.

The court stated that in the first situation withdrawal is effective upon timely and unequivocal notification of co-conspirators of his decision to abandon the unlawful purpose. On the other hand, in the second situation, because A has participated in a more substantial manner, A must do something further than merely communicating to his co-conspirators his intention to dissociate; he must also take steps to attempt to frustrate the effect of his contribution. Commenting upon this approach in 1992 Annual Survey of South African Law at 511 the authors agree that the role of the conspirator and the degree of his participation are central to the issue. However, they question the utility of a distinction based on commencement of overt acts. They point out that frequently a party is remote from the commission of the crime and yet he has already played a substantial or dominant role in the enterprise (e.g. by supplying the weapons to use in a robbery or supplying vital information or the keys to warehouse etc.) Conversely, they say, a minor player who performs a relatively insignificant overt act should, in certain circumstances, be allowed to dissociate himself from it. They suggest that a “pragmatic and theoretically defensible approach might be to consider what the accused has done to dissociate himself from the enterprise and to determine whether, at the end of the day, he may still be said to have dissociated himself sufficiently with the conduct of the immediate party or parties to justify a judgment that he is, in law, responsible for that conduct. Such an approach would view evidence of ‘association’ and ‘dissociation’ as being two sides of the same coin. This approach would be more realistic than one which treats dissociation as a second inquiry determined by its own rules, whether mechanical or otherwise.”

In S v Chinyere 1980 ZLR 3 (A); 1980 (2) SA 576 (RA) members of a gang conspired to break into some premise in order to steal. X was a member of that gang. He had not incited the others to commit this crime. After some members of the gang had broken in, X got scared and ran away.
The rest of the gang still went on to steal. The court held that he was guilty of housebreaking but only of conspiracy to commit theft. On the other hand, in Ndebu & Anor 1986 (2) SA 133 (ZS) X and Y had in concert set out to rob. Before the fatal shot was fired X had fled. The court held that that X was still liable for murder on the basis of the common purpose and the running away was only an extenuating circumstance.

In the South African case of S v Nduli & Ors 1993 2 SACR 501 (A) the court said that dissociation consists of some or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration. It is a good defence to a charge of complicity in the eventual commission of the offence by his erstwhile associates. The more advanced a person’s participation in the commission of the crime, the more pertinent and pronounced his conduct will have to be to convince a court, after the event, that he genuinely meant to dissociate himself from it at the time. It remains a matter of fact and degree as to the type of conduct required to demonstrate such an intention. The court found it unnecessary to decide whether the “more rigid” rule enunciated by our Supreme Court in the Beahan case reflected the law in South Africa or was to be treated as a rule of thumb.

In S v Stanley HH-97-10 the courts said “Conspiracy” may be defined as the act of conspiring; combination for unlawful purpose, plot. A conspirator is one engaged in a conspiracy. In general a conspirator is liable for the crime perpetrated by his co-conspirators. But where he has effectively withdrawn from the conspiracy, he does not remain liable for the commission of any subsequent criminal acts. The terms “withdrawal” and “dissociation”, which are often used in this context of the law, refer to a voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy. The reason for allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered. The actual role of the conspirator will determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner, something further than a communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required.

This matter of withdrawal is dealt with in more detail in the Guide pp 48-50.

Extra-territoriality [s 201]

This governs the extra-territorial aspects of being an accomplice to a crime committed within or outside Zimbabwe.

Presumptions, jurisdiction, powers and defences [s 203]

This applies to accessories the same presumptions, jurisdiction, powers and defences as are applicable in relation to the actual perpetrators, whether under the Code or any other enactment.
When accomplice liability is concurrent or does not apply [s 204]

The provisions dealing with accomplice liability will not affect special rules relating to the liability of participants contained in the Code or in other enactments.

With some crimes like treason incitement, conspiracy, attempt or failure to report the crime constitutes the crime of treason itself and not merely incitement, conspiracy or attempt to commit the crime. The inciter, conspirator or attempter is thus guilty of such a crime as an actual perpetrator and not merely as an accomplice.

With continuing crimes like theft the person assisting may be a perpetrator rather than an accomplice.

Punishment [s 202]

An accomplice is liable to the same punishment that he or she would have been liable if he or she been the actual perpetrator of the crime.

See Guide pp 46-50 and 165-171

(But note that some aspects of the law that applied previously have been modified by the Code.)

Conducing to commission of offence by child or young person

The Children’s Act [Chapter 5:06] provides for a number of situations where others can be criminally liable for crimes committed by children or young persons. In this Act a “child” is defined as “a person under the age of sixteen years and includes an infant” and a “young person” as who has attained the age of sixteen years but has not attained the age of eighteen years.

13 Conducing to commission of offence by child or young person

(1) Any person who—
(a) encourages a child or young person to commit an offence; or
(b) trains a child or young person in the commission of an offence; or
(c) knowingly provides a child or young person with facilities to commit an offence;
shall be guilty of an offence and liable to the penalties that could have been imposed on him had he been guilty of the offence that the child or young person committed.
(2) Any parent or guardian of a child or young person who fails to take reasonable steps to ensure that that child or young person does not commit an offence is guilty of an offence and liable to any penalty that may be imposed on a person convicted of the offence committed by the child or young person.
(3) Where a person has been convicted of an offence in terms of subsection (1) the court may, in addition to any penalty which may be imposed therefor, order the person convicted to pay to any party who has been caused damage or loss by the commission of the offence concerned by the child or young person compensation for that damage or loss, whether the injured party makes any claim therefor or not.

Comment
There are some problems with the offence in subsection 2. If the child or young person has committed a crime requiring proof of intention, it would violate normal principles of liability to convict the parent or guardian of this offence on the basis of his or her negligence in failing to take reasonable steps to ensure that that child or young person does not commit the offence.
Assistance after commission of crime

[§ 205]

Definition of accessory [§ 205]

An accessory to a crime is a person who renders assistance to the actual perpetrator of the crime or any accomplice of the actual perpetrator after it has been committed.

Basis of liability [§ 207]

X renders assistance to the actual perpetrator or accomplice after the commission of the crime enabling him or her

➢ to conceal the crime;
➢ to evade justice

or X in other way associates with crime by rendering assistance to the actual perpetrator or accomplice.

X can only be liable as an accessory if when he or she assists the actual perpetrator X

➢ knows that the actual perpetrator has committed a crime; or
➢ realises that there is a real risk that the actual perpetrator has committed a crime.

Types of assistance [§ 208]

This section provides a non-exhaustive list of types of assistance that can make a person liable as an accessory—

➢ concealing, sheltering or feeding the actual perpetrator in order to enable the actual perpetrator to escape apprehension;
➢ providing transport to enable the actual perpetrator to escape apprehension;
➢ destroying or concealing evidence of the commission of a crime;
➢ giving false information to a police officer or other person in authority concerning the circumstances of the crime or the whereabouts of the actual perpetrator.

In S v Choruma & Anor 2010 (1) ZLR 403 (H) the judge stated that the elements of the crime of being an accessory to a crime are—

➢ knowledge that the actual perpetrator has committed a crime, or the realization that there is a real risk or possibility that the actual perpetrator has committed a crime, and
➢ rendering the actual perpetrator or his accomplice assistance which enables him to conceal the crime or to evade justice, and
➢ the assistance must be rendered after the crime has been committed.
In an appropriate case the accused can be convicted as an accessory after the fact, of the crime which had been committed at the time he rendered assistance, even if at the time of rendering assistance he did not know what crime had been committed. He must, however, believe that a crime has been committed, and with that knowledge render assistance to conceal it, or help the actual perpetrator to evade justice. Giving false information to a police officer or other person in authority concerning the circumstances of a crime renders the giver of false information an accessory to the crime.

_Extra-territorial application_ [s 209]

This governs the extra-territorial aspects of being an accessory to a crime committed within or outside Zimbabwe.

_Presumptions, jurisdiction, powers and defences_ [s 211]

This applies to accessories the same presumptions, jurisdiction, powers and defences as are applicable in relation to the actual perpetrators, whether under the Code or any other enactment.

_When accessory liability is concurrent or does not apply_ [s 212]

The provisions dealing with accomplice liability will not affect special rules relating to the liability of participants contained in the Code or in other enactments.

With some crimes like treason incitement, conspiracy, attempt or failure to report the crime constitutes the crime of treason itself and not merely incitement, conspiracy or attempt to commit the crime. The inciter, conspirator or attempter is thus guilty of such a crime as an actual perpetrator and not merely as an accomplice.

With continuing crimes like theft the person assisting may be a perpetrator rather than an accomplice.

_Penalty_ [s 210]

The accessory (X) is liable to the same penalty to which X would have been liable if X had been convicted of the crime committed by the actual perpetrator to which he or she rendered assistance.

See _Guide_ pp 51 and 171-172
GENERAL DEFENCES AND MITIGATING FACTORS

This provides for the types of defences that may be made to criminal charges brought under the Code or any other enactment.

Preliminary matters

Categorisation of defences

Defences are grouped in the following categories
- defences affecting voluntary conduct;
- defences relating to the state of mind of the accused;
- and defences relating to unlawfulness.

Complete and partial defences [s 213]

Some of these defences are complete defences completely absolving X from criminal liability for a crime and some are partial defences that reduce the crime charged to some lesser crime.

Defences in Code are not exhaustive [s 214]

The provisions in the Code dealing with defences do not purport to codify all possible defences that may be raised, but only the most common or important ones. Thus X can still raise defences and mitigatory factors not contained in the provisions of the Code relating to defences.

Defences relating to voluntary conduct

Automatism

[s 216]

This can be a complete defence.

It is a fundamental principle of criminal law that no person may be held criminally liable except for voluntary conduct. (see s 9). Thus X should not be found guilty of a crime where his or her action was involuntary. The defence of “automatism” deals with situations where the action was performed without any control or conscious knowledge.
This defence is a complete defence to a criminal charge, except in cases where the person was at fault in bringing about the situation where his or her conduct was involuntary (for example, where the person drives a motor vehicle knowing that he or she may suffer from an epileptic fit while driving it, and causes the death of another person when this eventuality occurs).

In cases where the person’s involuntary conduct is the result of a mental disorder (“insane automatism”) the court is required to return a special verdict in terms of section 29 of the Mental Health Act, 1996.

Requirements [s 216(1)]

X’s conduct was not voluntary, that is, that X did or omitted to do anything that is an essential element of the crime without conscious knowledge or control.

The involuntary conduct must was not have been brought about by X’s own fault. [s 216(3)]

Situations in which conduct is not voluntary [s 216(2)]

Situations in which conduct is not voluntary include the following—

- a reflex movement, spasm or convulsion;
- a bodily movement during unconsciousness or sleep;
- conduct during hypnosis, or which results from hypnotic suggestion;
- conduct over which a person has no control, his or her body or part of his or her body being merely an instrument in the hands of a human or natural agency outside him or her (a example of a natural agency (An example of a “natural agency” affecting the movements of a person is a powerful gust of wind that may cause an involuntary movement of the body or limbs of a person.))

Involuntary conduct resulting from mental disorder [s 216(4)]

If the involuntary conduct was the result of a mental disorder or defect, a court must return a special verdict in terms of s 29 of the Mental Health Act.

Cases

In S v Evans 1985 (1) ZLR 95 (S) the appellant was charged with and convicted of culpable homicide arising out of a collision between two railway trains allegedly caused by his negligent driving of one of the trains. In his defence he testified that he had suffered a “black-out” due to the stress and irregular hours of his work and so had been unable to activate the appropriate braking system in time to avoid the collision. Despite the fact that a medical practitioner called by the prosecution conceded that it would not be unexpected that a person leading the life of an engine-driver should suffer a black-out, the trial court found that the appellant had not established the defence and that in any event, if he had proved it, the court would have been obliged to enter a special verdict in terms of s 28 of the Mental Health Act, 1976.

On appeal it was held that there is no onus on an accused person to establish the defence of a black-out; as with the defence of compulsion, all that is required is that there emerge from the evidence material sufficient to raise the issue as a realistic issue. Once the issue is so raised the persuasive burden of proving the mental element of the offence rests with the prosecution. The
medical practitioner’s evidence laid a foundation for the defence of a black-out and the persuasive burden of proving that the appellant was negligent then rested with the prosecution. The appellant’s black-out was a defence to the charge.

The definition of “mentally disordered or defective” in s 2 of the Mental Health Act, 1976, does not encompass a person who suffers from a black-out such as the one suffered by the appellant, where the black-out was not caused by an injury. A special verdict of “guilty but insane” in terms of s 28(1) of the Act would therefore have been wrong. See also “Firm and Shaky Foundations for the Defence of Black–Out” 1985 Vol 3 Zim Law Review 100–109.

In *Trickett* 1973 (3) SA 526 (T) the defence of sane automatism was raised to a charge of negligent driving. X said that she may have suffered unexpected blackout whilst driving. The defence failed because X had not discharged the evidential onus.

In *S v Cunningham* 1996 (1) SACR 631 (A) X while driving his vehicle collided with two cyclists. He pleaded the defence of sane automatism to a charge of culpable homicide. The court held that although he was upset and preoccupied with his problems at the time of the accident, he was not acting in a state of automatism.

In *R v Ncube* 1977 (2) RLR 304 (G); 1978 (1) SA 1178 ruled that in some cases where X acts violently because he is responding to a nightmare, an acquittal on the basis of sane automatism may follow rather than a special verdict being handed down. In the present case, however, the court returned a special verdict after the accused fatally stabbed his brother when he was sleep walking and he was reacting to the threatening realities of a dream. The special verdict was appropriate as it was necessary that the accused be subjected to medical examination to ascertain whether he was suffering from any underlying psychiatric problem that could recur in the future. (See case note in 1979 Zimbabwe Law Journal 11)

---

**Defences and Mitigatory Factors Relating to Mental State**

**Intoxication**

[s 219-s 225]

Intoxication refers to situations where a person is intoxicated as a result of the consumption of alcohol or drugs.
Involuntary intoxication

[s 220]

Involuntary intoxication means intoxication that is not voluntarily self-induced. Involuntary intoxication refers to a situation where a person does not voluntarily become intoxicated. Instead someone else causes the person to become drunk without the person knowing that this is happening, for example, where Y slips alcohol or a drug into X’s soft drink and Y consumes the soft drink not knowing that it has alcohol or a drug in it.

Crimes requiring proof of intention, knowledge or realisation of real risk [s 220(1)]

Involuntary intoxication can be a complete defence to such a crime if effect of the intoxication was such that he or she did not form the intention or have the knowledge or realise the existence of risk required. However, it will not be a defence if, despite the involuntary intoxication, X was still able to form the necessary intention, have the knowledge or realise the risk.

Crimes of negligence [s 220(2)]

Involuntary intoxication can be a complete defence to such a crime. However, the crucial question will be whether X behaved negligently after becoming involuntarily intoxicated. For example, if after involuntarily consuming alcohol, X realised that something was wrong and that he or she was not in a fit state to drive and, knowing this, attempted to drive and had an accident that caused someone’s death. In this situation X would be guilty of culpable homicide because he or she would have been negligent. If, on the other hand a drug slipped into X’s drink suddenly and without any forewarning started to have a drastic effect upon X after he or she had started to drive and this led to a fatal accident, X may not have been negligent. See the following cases–

In S v Gardener 1974 (2) RLR 48 (G); 1974 (4) SA 304 X was charged with drunken driving. Although she was involuntarily intoxicated because vodka had been poured into beer without her knowledge, she was found guilty because she had intentionally driven her vehicle and was not unaware of what she was doing when she drove towards her home.

In R v Innes Grant 1949 (1) SA 753 (A) X was charged with culpable homicide after a fatal motor accident. He was found guilty because even if X’s condition was involuntary, accused was not so incapacitated that he did not know what he was doing. He was negligent in doing so.

In S v Hartyani 1980 (3) SA 613 (T) X was charged with drunken driving. The defence of involuntary intoxication succeeded as a defence to the charge and X was found not guilty as her drink had been spiked and she was not aware of what she was doing when she attempted to drive. See Guide pp 21 and 137.

Voluntary intoxication
Voluntary intoxication is intoxication that is voluntarily self-induced. Voluntary intoxication is where a person becomes intoxicated as a result of voluntarily consuming alcohol or drugs.

**Common law**

Under the common law, voluntary intoxication could be a partial defence. It could reduce murder to culpable homicide, assault with intent to do grievous bodily harm to common assault and rape to indecent assault where the intoxication caused X to mistakenly believe that the female was a consenting party.

**The Code provisions**

*Crimes of intention* [s 221(1)]

The Code provisions replace the common law. Under the Code voluntary intoxication will now be a defence to any crime requiring proof of intention, knowledge or realisation of a real risk if, at the time of the conduct that would otherwise constitute the crime, the effect of the intoxication upon X was such that he or she did not form the intention or have the knowledge or realise the existence of risk required. Thus, for instance, voluntary intoxication can now be a defence to what was previously referred to as common assault.

On the other hand, if despite the intoxication, X was still able to form and did form the requisite subjective state of mind, he or she will be found guilty of that crime, but the court may regard his or her intoxication as mitigatory.

*Crimes of negligence* [s 221(2)]

Voluntary intoxication cannot operate either as a defence or in mitigation of sentence in relation to a crime requiring proof of negligence.

*New strict liability crime of voluntary intoxication leading to unlawful conduct* [s 222]

It is contrary to public policy to allow a person to escape liability completely where they cause harm in a state of voluntary intoxication. If they are not punished at all, no deterrent influence will be brought to bear upon those who irresponsibly get themselves drunk and cause harm whilst in this drunken state.

The Code has therefore followed the approach in South Africa. Under this approach if X is acquitted of a subjective crime on the basis that he or she lacked intention, knowledge or realisation of a risk because of intoxication, that person can instead be found guilty of the new strict liability crime entitled “voluntary intoxication leading to unlawful conduct.” As this latter crime is a strict liability crime, the state does not have to prove that X acted intentionally or negligently. All it has to prove is that X voluntarily got drunk and in this drunken and irresponsible state he or she caused harm. It is immaterial for this crime that he or she did not intend to cause harm, did not know he or she was doing so and did not realise that there was a risk that he or she would do so.
For this strict liability crime, X can be sentenced to the same punishment as would have been imposable had he or she been found guilty of the crime with which he or she was originally charged.

See Guide pp 21-24 and 138-139.

**Intoxication facilitating the commission of the crime (Dutch Courage)**

Voluntary intoxication cannot be pleaded as a defence or in mitigation where a person deliberately becomes intoxicated to facilitate the commission of a crime.

This will be the situation where X forms the intention to commit a crime and then becomes voluntarily intoxicated for the purpose of enabling him or her to commit the crime or facilitating his or her commission of the crime. If X then goes on to commit the crime that he or she had formed the intention to commit; X will be guilty of the crime on the basis of his or her original intention, in all respects as if he or she had not been intoxicated when he or she did or omitted to do the thing concerned.

If a person becomes voluntarily intoxicated realising that there is real risk or possibility that he or she will, in his or her intoxicated condition, engage in any conduct for which he or she may be held criminally liable, he or she may be convicted of the crime constituted by the conduct on the basis of his or her original realisation, in all respects as if he or she had not been intoxicated when he or she did or omitted to do the thing concerned.

See Guide p 23.

**Intoxication leading to mental disorder**

A verdict that the person was mentally disordered must not be returned if the person’s mind was only temporarily disordered or disabled by the effects of alcohol or a drug. This sort of case must be dealt with under the defence of voluntary intoxication.

Voluntary or involuntary intoxication resulting in a permanent or long-lasting disorder or disability of mind will be capable of constituting a defence of mental disorder to a criminal charge arising out of any conduct on the part of the person charged whilst he or she is suffering from the disorder or disability.

*Case*

In *S v Dube* 1997 (1) ZLR 229 (H) although the court found that X affected by alcohol and drugs and by post-traumatic stress disorder, X was nevertheless aware of what he was doing and was capable of forming the necessary specific intent, and that the he should be convicted of murder with actual intent, although with diminished responsibility. There was no evidence that the accused was intoxicated to such an extent as to be unaware of what he was doing or unable to appreciate the consequences of his actions.
Voluntary intoxication leading to provocation

[s 224]

If X, while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, the court will regard such provocation as mitigatory when assessing the sentence in accordance with the provisions in the Code relating to provocation.

Insanity

[s 226-229]

These sections provide for the defence that the accused was mentally disordered or defective at the time he or she committed the crime (“the defence of insanity”). The legal consequences of this defence, where it is proved, are now governed by section 29 of the Mental Health Act. Under that Act the court is required to return a special verdict of “not guilty by reason of insanity” and thereafter the accused may, depending on the outcome of an examination, be detained in an institution at the President’s pleasure.

Insanity can be a complete defence to any charge including murder. The correct verdict here will be not guilty because of insanity. The effect of s 229 of the Criminal Law Code [Chapter 9:23] is that if an accused person is proved to have committed the acts constituting the crime charged, but is also proved that the accused was suffering from a mental disorder or defect at the time of committing the offence which made him or her not responsible for his or her actions, he or she will be found not guilty in terms of s 227 of the Code.

However, if X’s responsibility was diminished rather than negated will only be a mitigatory factor that X was suffering from diminished responsibility.

The defence of insanity will not avail an accused if he or she became temporarily insane as a result of voluntary intoxication.

Mental disorder or defect [s 226]

As in the Mental Health Act “mental disorder or defect” is widely defined to mean mental illness, arrested or incomplete development of the mind, psychopathic disorder or any other disorder or disability of the mind.”

In s 2 of the Mental Health Act a “psychopathic disorder” is defined as

“a persistent disorder or disability of the mind, whether or not subnormality of intelligence is present, which has existed or is believed to have existed in the patient from an age prior to that of eighteen years, and results in abnormally aggressive or seriously irresponsible conduct on the part of the patient.”
Mental disorder or defect at time of crime [s 227(1)]

This codifies the existing defence of insanity, comprising the so-called “M’Naghten rules” and the concept of “irresistible impulse”.

X will have this defence if when he or she committed the crime he or she was suffering from a mental disorder or defect that made him or her–

- incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or
- incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.

Cause of mental disorder immaterial [s 227(2)]

The cause and duration of the mental disorder, defect or disability is immaterial. X will have this defence whether the cause of the mental disorder or disability is organic (that is arising from an injury or disease of the brain) or functional (that is affecting physical functions) or physical in nature (such as where the mental disability emanates from concussion due to a blow to the head.)

See R v Senekal 1969 (4) SA 478 (A), S v Mawonani 1970 (1) RLR 41 (A) and S v Ncube 1977 (2) RLR 304 (G)

Duration of mental disorder immaterial [ s 227(2)]

The duration of the mental disorder or defect is immaterial. If X was suffering from a mental disorder, defect or disability at the time he or she committed the crime, the fact that the disorder, defect or disability was only temporary in nature and X is no longer suffering from this at the time of the trial is irrelevant.

See R v Senekal 1969 (4) SA 478 (A) (concussion leading to mental disorder or disability), S v Mawonani 1970 (1) RLR 41 (A) (hysterical dissociation) and S v Ncube 1977 (2) RLR 304 (G) (sleepwalking)

Mental disorder at time of trial [s 228]

The fact that X is mentally disordered at the time of his or her trial on a criminal charge will not be a defence to the charge unless X was also mentally disordered or defective at the time that he or she is alleged to have committed the crime.

In S v Machona HH-14-02 after a series of personal misfortunes, the appellant attempted to commit suicide by cutting his own throat. When taken to a doctor for treatment, he attacked the doctor, severely and permanently injuring him. The medical evidence was that the appellant, who was charged with attempted murder, had suffered a brief “reactive psychosis” or “psychotic episode” which was unlikely to recur. The court held that the appellant was mentally disordered at the time, and not merely suffering from diminished responsibility, and should have been found not guilty by reason of insanity. Because he was no longer mentally disordered, he was entitled to be released from custody.
Voluntary intoxication [s 227(3)]

The defence of insanity will not be applicable where X is temporarily mentally disordered or disabled as a result of voluntary intoxication. This situation will be dealt with under the rules relating to the defence of voluntary intoxication. It is only if at the time of the crime X is suffering from a permanent or long lasting mental disorder as a result of abuse of alcohol or drugs that the defence of insanity will apply instead of the defence of voluntary intoxication.

In S v MacGregor 1975 (1) RLR 77; 1975 (2) SA 385 the court ruled that where there is temporary mental incapacity due to voluntary intoxication, the special verdict must not be returned.

Continued application of Mental Health Act [s 229]

The Mental Health Act will continue to apply in relation—

- the procedure to be followed when persons being tried are found to be mentally disordered or defective or any verdict to be returned at any such trial; or
- the detention, examination or treatment of persons found to be mentally disordered or defective.

Onus of proving insanity [s 18]

With the defence of insanity the accused has the burden of proving the defence on a balance of probabilities. (See S v Moyo 1969 (1) RLR 162 (G) at 163; R v Benjamin 1968 (1) RLR 126 (G) at 127 and S v Taanorwa 1987 (1) ZLR 62 (S) at 66.

Cases

In S v Moyo 1969 (1) RLR 162 (G) a mother killed newly born child. She was found guilty but mentally disordered.

In S v Senekal 1969 (4) SA 478 (RA) X fatally stabbed another person. The court returned the special verdict that X was guilty but mentally disordered even though the temporary disablement or disorder was due to concussion which he suffered as a result of a blow to the head and even though X was apparently fully recovered at time of his trial.

In S v Johnston 1970 (1) RLR 58 (G) the court ruled that amnesia, which is not associated with any form of mental disorder or unconscious action amounting to automatism is not a defence to a criminal charge. X was found guilty. (However, if there is genuine amnesia about what happened at the time of the crime, the crime must be brought home to the accused so that he can be given a proper opportunity to defend himself.)

In S v Mawonani 1970 (1) RLR 41 (A); 1970 (3) SA 448 (RA) X was a spirit medium. After he had gone into a trance, he had suddenly and without any reason killed his brother with whom he had been on good terms. The court returned a special verdict based upon the psychiatric assessment that he had killed his brother in a state of hysterical dissociation.

In S v Ncube 1977 (2) RLR 304 (G); 1978 (1) SA 1178 a special verdict was returned where X fatally stabbed brother when sleep-walking and reacting to threatening realities of his dream. The court held that the special verdict was appropriate as it was necessary that the accused be subjected to medical examination to ascertain whether he was suffering from any underlying
psychiatric problem that could recur in the future. (See case note in 1979 *Zimbabwe Law Journal* 11)

In *S v Mapfumo* A-48-79 there was a possibility that X was suffering from hysterical dissociation but there was no evidence that he was unaware of nature and quality of his acts and that what he was doing was wrong. He was found guilty of murder.

In *S v Smith* 1980 ZLR 32 (G) X had a motor accident. He alleged that he had suffered amnesia. No medical evidence was led to support the allegation. It was held that X had not discharged onus resting on him to prove mental disability.

In *S v Time* A-21-81 the appeal court ordered a psychiatric examination to determine the mental state of X when he murdered his daughter. This examination was necessary to ascertain if there was some diminished sense of responsibility as the murder was motiveless. A special verdict was then returned.

In *S v Dube* 1997 (1) ZLR 229 (H) X was charged with murder, it being alleged that in the early hours of 24 September 1995, at Gwanzura Stadium, Harare, he had shot and killed the deceased. He had been urinating in a public place and was approached by the deceased, a police officer, who remonstrated with him. X did not deny the shooting, but gave evidence that he had been very intoxicated at the time. He also claimed that the deceased had approached him, referring to him as “Banana’s wife”. It was the X’s case that during the 1980s, when he was an aide to the then President, the Rev C Banana, the President had on various occasions committed homosexual acts on him against his will. The anger the deceased’s comment induced also caused his violent reaction. Psychiatric evidence was given that X was suffering from post-traumatic stress disorder as a result of these acts. There was a conflict between the evidence of the two psychiatrists called, one saying that the combination of this disorder and X’s drunkenness would have amounted to a mental disorder and that as a result thereof X would not have been responsible according to law for his actions. The other psychiatrist said that the disorder would not have prevented X from appreciating what he was doing or the consequences of his actions. On the question of X’s mental state, the court held that although post-traumatic stress disorder could fall within the wide definition of mental disorder found in the Mental Health Act, it was not a disorder, on the facts found proved, which would have prevented X from being aware of what he was doing or of the consequences of his actions. The combination of alcohol, drugs and the stress disorder would, however, have meant that X was suffering from diminished responsibility. It was argued that the court should follow the decision in *S v Arnold* 1985 (3) SA 256, where the accused was acquitted of murder because of his emotional state. The court held that Arnold’s case was incorrect on the law - Arnold should have been convicted of culpable homicide - and not applicable on the facts.

In *S v Makaka* S-25-87 a psychiatric investigation was ordered.

In *S v Chiwambutsa* S-113-87 a further mental examination was ordered.

In *S v Taanorwa* 1987 (1) ZLR 62 (S) a further mental examination was ordered. In *Joseph* S-82-85 a fuller mental examination was ordered by the court as the first examination was considered to be inadequate.
For a discussion on some of the difficulties of dealing with these sort of cases see the following articles in the Legal Forum: 1988 Vol 1 No 2 p 42; 1989 Vol 1 No 4 p 28; 1989 Vol 1 No 5 p 27; 1993 Vol 5 No 2 p 20.

In S v K (a juvenile) 2009 (2) ZLR 409 (H) X had shot and killed his parents when he was aged 16. The psychiatric evidence was to the effect that X had been suffering from post-traumatic stress disorder and had temporal lobe epilepsy which made him not responsible for his actions because of a mental defect. The court found him not guilty because of insanity and ordered that he be returned to prison he has to be returned to prison where he will be transferred to an institution or special institution for examination or treatment. In reaching this conclusion the court set out in detail the law pertaining to the defence of insanity.

**Order of court when a person is found not guilty because of insanity**

In the case of S v K (a juvenile) 2009 (2) ZLR 409 (H) the court dealt with the law in this respect. It said that when a person is found not guilty because of insanity that person must be dealt with in terms of s 29(2) (a)-(c) of the Mental Health Act [Chapter 15:12]. The court has three options under s 29(2):

(a) if the person still needs to be mentally examined or to be treated, he has to be returned to prison where he will be transferred to an institution or special institution for examination or treatment; (If this provision is applicable, the condition of a prison does not justify the court’s refusal to send to prison those the law says must be send there. The court has to proceed in terms of the correct option.) From prison the accused must be transferred to a designated institution or special institution, as defined by s 2 of the Act.

(b) if the offence in respect of which a special verdict has been returned was one for which the person could not have been sentenced to imprisonment or a fine exceeding level three, then the accused can be released to be dealt with in terms of s 29(2)(b);

(c) if the court is satisfied that the person is no longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged, it can order his discharge

See Guide pp 17-20 and 134-137.

---

**Defence of non-pathological criminal incapacity**

In a series of cases the South African courts have recognised as a full defence to a criminal charge the defence of non-pathological criminal incapacity. (See the South African cases of S v Campher 1987 (1) SA 940 (A); S v Laubscher 1988 (1) SA 163 (A); S v Calitz 1990 (1) SACR 119 (A); S v Wiid 1990 (1) SACR 561 (A) and S v Smith 1990 (1) SACR 130 (A) at 135.)

This defence will apply where X lacks criminal capacity due to a cause other than mental illness. This defence can be raised in situations where X suffers an emotional collapse or severe emotional stress, often emanating from provocative action and behaviour towards X over a period
of time. This defence could have application to a situation where a woman loses her powers of self-control after being subjected to domestic violence by a brutal husband. In South Africa the defence has been successful in other situations in which the emotional stress has arisen from factors such as shock, fear and tension which have strained the powers of self-control until the accused has eventually lost his or her powers of self-control and snapped. (See the Arnold case.)

This defence carries potential dangers to the public if it is allowed too easily and a number of writers have said that the defence must be approached with caution and some writers have expressed scepticism about this defence. See, for instance, Burchell and Milton Principles of Criminal Law (Second edition) pp 278-296.

In the case of S v Munga 2003 (1) ZLR 591 (H) the court stated that the defence of non-pathological incapacity has to be treated with great caution as it can be raised easily by an accused but it is very difficult for the state to refute. If the courts allowed the defence to succeed easily the criminal justice system would quickly be discredited. A brief emotional disturbance would not satisfy the defence, although an act preceded by a very long period of months or years in which the accused’s level of emotional stress increased progressively might do so. The onus lies on the accused to establish this defence.

This defence has not been specifically incorporated into the Criminal Law Code. It is referred to in passing in the case of S v Gambanga 1998 (1) ZLR 364 (S) and has been the subject of a number of High Court decisions.

In the case of S v Ncube & Anor (1) 2002 (2) ZLR 153 (H) a woman killed her husband by cutting his throat with an axe as he lay drunkenly asleep. For more than four years she has suffered abuse from her husband. He was a heavy drinker and used to assault her once or twice a week with an electrical cord; on at least one occasion she had to be hospitalised after such an assault. He also assaulted their two young children, and occasionally threatened to kill his wife. On the night in question he had come home drunk and abused her and told her to leave the house. After he had fallen asleep and had taken the axe and killed him by striking him twice on the neck. Her defence to a charge of murder was non-pathological criminal incapacity. She maintained that she had acted under an emotional storm brought about by the prolonged physical and mental abuse by her husband and that she had been incapable of appreciating the wrongfulness of her actions or acting in accordance with an appreciation of such wrongfulness. The court did not accept this defence. She had acted intentionally with premeditation and had not acted subconsciously. She had not acted in a state of criminal incapacity and was aware of the wrongfulness of what she was doing. (She had in fact
told the psychiatrist who examined her that she had got angry after the husband had beaten her and had decided to kill him when he was asleep. She was therefore found guilty of murder.

Another possible line of defence in a case of a brutalised woman is that the woman was suffering from a mental disability at the time she killed brought about by the accumulation of stress and tension arising from successive acts of brutality perpetrated upon her and her children by her violent spouse. The provisions of s 29 as read with s 2 of Health Act are sufficiently wide to allow the court to return a verdict of not guilty by reason of insanity and to decide to release the woman in question and not to commit her to a mental institution. (If the judge court convicting the woman is satisfied that the accused person is no longer mentally disordered or is otherwise fit to be discharged, it may order her discharge and, where appropriate, her release from custody.)

If the abused wife has killed her husband and has been charged with murder the defence of provocation could apply, either under the first or second rungs of the two-stage approach. The second rung is particularly useful in a case where a battered woman kills intentionally having lost her self-control.

If the woman has killed or injured her husband in order to defend herself against a brutal assault by her husband, in appropriate circumstances the battered wife could also raise the defence of private defence.

Diminished responsibility

[ss 217 & 218]

Diminished responsibility does not constitute a defence but is only taken into account in mitigation of sentence. Note that diminished criminal capacity caused by intoxication or provocation will be dealt with under the rules relating to the defences of intoxication and provocation and not under the provisions relating to diminished responsibility.

The plea of diminished responsibility on the part of a perpetrator of a crime is a plea by or on behalf of the perpetrator to the effect that his or her capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation was reduced by reason of some disorder or stress affecting the mind of the perpetrator.

The case of *S v Gambanga* 1998 (1) ZLR 367 (S) makes it clear that diminished responsibility may result from a “non-pathological incapacity” occasioned by severe emotional stress, and not only from a less than total mental disorder or defect as such. (See also *S v Mutsipa* S-3-90)

**When diminished responsibility will be mitigatory** [s 218(1)]

It will be mitigatory when X commits a crime when he or she is suffering from an acute mental or emotional stress, or a partial mental disorder or defect and this diminishes his or her capacity to appreciate the nature of his or her conduct or that his or her conduct was unlawful or to act in accordance with such appreciation.

**Where diminished responsibility due to X’s fault** [s 218(2)]

If the acute mental or emotional stress, or partial mental disorder or defect, is brought about through the person’s own fault, a court may regard such person’s responsibility as not having
been diminished. The kind of situation contemplated is where a person who is required to take medication to relieve the symptoms of a partial mental disorder or defect knowingly fails to do so and thereafter commits a crime.

“partial mental disorder or defect” means a mental disorder or defect as defined in s 226, the effect of which is not such as to entirely deprive the person suffering from it of the capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation. [s 217]

**Intoxication and provocation** [s 218(3)]

Diminished capacity due to intoxication or provocation will be dealt with under these specific defences and not under diminished responsibility but it should be noted that in terms of section s 224 if X, while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, this is only mitigatory.

**Insanity** [s 218(4)]

Where a mental disorder or defect is such as to negate rather than diminish X’s mental capacity, X will be entitled to a complete defence in terms of s 227.

**Onus of proving diminished responsibility** [s 18]

The accused bears the onus of proving diminished responsibility on a balance of probabilities.

**Cases**

See *S v Nyati* 1974 (2) RLR 19 (A); *S v Mapfumo* A-48-79; *S v Taanorwa* 1987 (1) ZLR 62 (S); *S v Mutsipa* S-3-90; *S v Chin’ono* 1990 (1) ZLR 244 (H); *S v Stephen* 1992 (1) ZLR 115 (H); *S v Sibanda* S-137-93; *S v Musimwa* S-198-94; *S v O’Neill* S-232-95; *S v Dube* 1997 (1) ZLR 229 (H).

In *S v Chikanda* 2006 (2) ZLR 224 (S) the court pointed out that the borderline between criminal responsibility and criminal non-responsibility on account of mental incapacity or illness is not an absolute one, but a question of degree. A person may suffer from a mental illness yet nevertheless be able to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation. Diminished responsibility only reduces the level of responsibility but does not completely absolve an accused person from his actions. Where the court finds that the accused, at the time of the commission of the act, was criminally responsible for the act, but that his capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing him. Medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence need to be supported by some other evidence. On their own, such reports may not be conclusive. The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts. Where medical reports of diminished responsibility are not supported by some other facts from the evidence the court is entitled to reject the claim of diminished responsibility if there are other factors which justify that rejection.
In this case X, who had had a stormy relationship with his wife and was living apart from her, came to her house at midnight and stabbed her to death. Shortly afterwards, he grabbed his young child from the arms of her grandmother and stabbed her to death as well. The grandmother said in evidence that he was generally somebody who was not well and did not give respect to elders. He was not mentally normal, though not insane. The medical report on X said there was evidence of unstable abnormal behaviour and a tendency to violence, due to underlying suspiciousness of a paranoid nature. The trial court made a finding of diminished responsibility. The appeal court found that the conduct of X before and immediately after the killing did not seem to support the defence of diminished responsibility and the trial court had misdirected itself in so finding.

See Guide pp 20 and 136.

---

**Minority**

[ss 230 & 231]

These sections codify the existing law on minority as a defence to a criminal charge.

*Presumption of incapacity of children below 7*

Children under the age of 7 are *irrebuttable* presumed to lack criminal capacity. It would therefore be pointless to prosecute a child of this age as that child cannot be convicted of a crime.

*Presumption of incapacity of children between 7 and 14 [s 230(1)]*

Children who are 7 or above but below 14 are *rebuttable* presumed to lack criminal capacity. This is provided for in s 7 of the Code.

This presumption can be rebutted if, at the time of the commission of the crime for which the child is charged, the child was sufficiently mature-

- to understand that his or her conduct was unlawful or morally wrong;
- to be capable of conforming with the requirements of the law.

In deciding whether the child was sufficiently mature to have the required understanding and capacity, the court must take into account all relevant factors including the following–

- the nature of the crime with which the child is charged;
- the child’s general maturity and family background;
- the child’s knowledge, education and experience;
- the child’s behaviour before, during and after the conduct which forms the basis of the charge.

[s 230(3)]

*Commission of crime by child between 7 and 14 in presence of older person [s 230(4)]*
Where a child of 7 or above but below 14 engages in conduct in the presence of an older person whom the child would be expected to obey because that person is so placed as to be able to control the child, it will be presumed until the contrary is proven that the child acted under the compulsion of the older person.

**Authority of Attorney-General [s 231]**

A criminal prosecution can only be instituted against a child who is 7 or above but below 14 if the Attorney-General has given his or her authority.

**Persons who are 14 or older**

There is no presumption that a person who is 14 but below the age of 16 lacks criminal capacity to form intention or to behave in the way that a reasonable person would have behaved in the circumstances. However, although there is no presumption of incapacity, the court may still find that the particular young person of tender years was so immature that he was unable to, and did not, form the requisite intention. See for instance the case of *S v P* 1972 (3) SA 412 (A).

See *Guide* pp 32-33 and 151-152

---

**Ignorance or mistake of fact**

[*ss 232-234*]

**Definitions [s 232]**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>essential fact</td>
<td>means any fact or factual circumstance which relates to an essential element of the crime</td>
</tr>
<tr>
<td>ignorance of a fact</td>
<td>complete lack of knowledge that the fact exists</td>
</tr>
<tr>
<td>mistaken about a fact</td>
<td>means an erroneous impression concerning that fact</td>
</tr>
</tbody>
</table>

**Crimes requiring proof of subjective state of mind [s 233]**

In respect of a crime that requires proof of a subjective state of mind, such as intention, knowledge or realisation, X will have a defence to this crime if X lacked the required state of mind because he or she X was mistaken or ignorant about an essential fact.

In respect of subjective crimes, the mistake has only to be genuine. The mistake does not have to be a reasonable one, although the unreasonableness of any mistake or ignorance may be taken into account in determining whether or not it is genuine.

**Crimes requiring proof of negligence [s 234]**

X will have a defence to a crime that requires proof of negligence, if X lacked the required state of mind because he or she X was mistaken or ignorant about an essential fact.
- when he or she did or omitted to do the thing, he or she was genuinely mistaken or ignorant as to an essential fact of the crime concerned; and
- the person’s mistake or ignorance of that essential fact was reasonable in all the circumstances.

See Guide pp 25-26 and 140-142.

---

**Ignorance or mistake of law**

[s 235-237]

**Definitions** [s 235]

“ignorance of the law” means complete lack of knowledge that the law exists;

“mistake of law” means an erroneous impression as to the nature or content of that law.

“law” means this Code or any other enactment;

**Ignorance or mistake of law no excuse** [s 236(2)]

These sections codify the defence of mistake or ignorance of the law. The existing rule is that ignorance of the law is no excuse.

X is criminally liable by virtue of his or her awareness of the essential facts comprising the crime with which he or she is charged, and not by virtue of his or her awareness that the conduct constituting the crime is unlawful.

**Reliance on mistaken advice of public official** [s 236(1)]

The existing exception to this rule is also incorporated into the Code. This exception is that ignorance of the law operates as a defence where the accused, being genuinely ignorant of a particular law, relies upon the mistaken advice of a public official whom he or she had reason to believe was charged with the administration of the law concerned and was familiar with its contents. It is yet to be decided if this exception would apply to a situation where a person relies on the mistaken advice of an experienced police officer. It does not apply to reliance on the advice of a private legal practitioner because that person is not a public official.

In any other case a genuine and even reasonable ignorance or mistake of the law will merely be a factor in mitigation of sentence.

**Comment**
In the commentary to the Bill of the Criminal Law Code it is asserted that the general rule that ignorance of the law is no excuse” is indispensable to the administration of justice.” This assertion is very arguable. In South Africa the rule has been dispensed with without apparently causing any undue problems for the administration of justice.

The rule that ignorance of the law is no defence is a very harsh rule. In an earlier draft of the Code a compromise formulation was suggested. This would have allowed a reasonable mistake or ignorance of the law to operate as a defence but the onus would have been on X to prove that his or her mistake or ignorance was reasonable. It is submitted that this approach is far fairer. The compromise formula read as follows—

“When mistake or ignorance of law a defence

(1) Subject to this Part, if a person does or omits anything which is an essential element of a crime in terms of any law, the person shall have a complete defence to a charge of committing that crime if—

(a) when he or she did or omitted to do the thing, he or she did not know that his or her conduct was unlawful because he or she was genuinely mistaken or ignorant as to the relevant provisions of the law; and

(b) the person’s mistake or ignorance as to the relevant provisions of the law—

(i) was reasonable and excusable in all the circumstances:

Provided that the burden of proving that the mistake or ignorance was reasonable and excusable shall lie on the person charged;

or

(ii) was directly brought about by advice given to him or her by an administrative or judicial officer whom he or she had reason to believe was charged with the administration of the law concerned and was familiar with its contents.

(2) In any circumstances other than those specified in subsection (1), genuine mistake or ignorance as to the relevant provisions of a law on the part of a person charged with a crime shall merely be a factor to be taken into account in the assessment of sentence.”


---

**Provocation**

[ss 238 & 239]

These sections codify the defence of provocation.

Provocation can be partial defence to a charge of murder but it is not a defence to any other crime, although it can be a mitigatory factor in respect of other crimes. (Previously provocation could also have been a partial defence to assault with intent to do grievous bodily harm. This no
longer applies because the Code has merged together what used to be the separate crimes of common assault and assault with intent to do grievous bodily harm.)

In cases other than murder the defence of provocation operates merely to mitigate sentence.

*Murder [s 239]*

In murder cases there is a two-stage approach.

The first stage is to decide whether X had intention to kill when he or she reacted to the provocation. If X did not have intention to kill, X will not be convicted of murder but only of culpable homicide.

If X had intention to kill, then the court will proceed to the second stage, which is to decide whether X lost his or her self-control and killed intentionally in circumstances where even the reasonable person, faced with this extent of provocation, would also have lost self-control. If X did lose his or her self-control and the reasonably person would have done likewise, X will have a partial defence and will be found guilty of culpable homicide and not murder. (In South Africa on the other hand if X killed intentionally X will be found guilty of murder and the provocation will only act in mitigation of sentence.)

*Where X didn’t intend to kill*

This defence will reduce the charge from murder to one of culpable homicide if as a result of X’s reaction to provocation

- X lacked the intention to kill and did not realise the real possibility that his or her actions would result in the death.

*Where X intended to kill*

Even if X intended to kill, the defence of provocation will still reduce the charge from murder to culpable homicide if

- as a result of provocation that would have been sufficient to make a reasonable person in his or her position to lose his or her self-control, X completely lost his or her self-control and intentionally killed Y.

In the case of *S v Nangani* 1982 (1) ZLR 150 (S) the Supreme Court suggested an alternative formulation of this test, namely the question should be asked: Was the provocation such as could reasonably be regarded as sufficient ground for loss of self-control that led X to act against the victim as he or she did. This formulation is preferable as it avoids the need to find that even a reasonable person would have gone ahead and killed if faced with that extent of provocation.

Clearly the second rung of the defence will only succeed in a limited range of situations where the provocation has been very severe. For example, it might apply–

- where X discovers his or spouse in the act of adultery and kills the spouse or his or her lover;
- where X kills a man whom he discovers raping his daughter or sodomising his son.
There are a number of cases in which the second rung has been applied. In *S v Nangani* 1982 (1) ZLR 150 (S) a man had killed his common law wife in circumstances which led him to believe that she had engaged in sexual intercourse with another man. He was found guilty of culpable homicide instead of murder even though he had had intention to kill. In *S v Ncube* S-14-87 a woman stabbed to death a woman who had been committing adultery with her husband when she found her kisses her husband. The court found that although she intended to kill the woman she has lost her self-control and the circumstances were such as to justify a verdict of culpable homicide instead of murder.

In *S v Mafusire* 2010 (1) ZLR 403 (H) the court pointed out that by virtue of s 238 of the Criminal Law Code [*Chapter 9:23*], provocation is not a complete defence. In respect of any crime other than murder, provocation is not a defence but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime. In murder cases there is a two-stage approach. The first stage is to decide whether the accused had the intention to kill when he reacted to the provocation. If he did not have intention to kill, he will not be convicted of murder but only of culpable homicide. If he had an intention to kill, then the court will proceed to the second stage, which is to decide whether the accused himself lost his self-control and killed intentionally in circumstances where even the reasonable person, faced with this extent of provocation, would also have lost self-control. If the accused did lose his self-control and the reasonable person would have done likewise, the accused will have a partial defence and will be found guilty of culpable homicide and not murder. In South Africa, on the other hand, if the accused killed intentionally, he will be found guilty of murder and the provocation will only act in mitigation of sentence. It is not enough to show merely that in the circumstances a reasonable man would have lost his self-control. There would have to be some evidence (leaving aside the question of onus) that the accused himself lost his self-control. What is meant by loss of self-control, and how that may differ from a lack of intention, is another matter. A loss of self-control is not absolute but is a matter of degree: there are many intermediate stages between icy detachment and going berserk.

See Guide 29-30 & 147.

**Attempted murder**

Although these Code provisions only deal with the possible reduction of murder to culpable homicide, provocation will also be a partial defence to attempted murder and the two-rung approach to provocation on a murder charge must also apply in respect of a charge of attempted murder. This is because s 193(2) provides that any defence that can be relied upon where the person has actually committed the crime may also be relied upon in respect of an attempt to commit that crime. If this defence is successful the crime of attempted murder will be reduced to assault. This is made clear in the Fourth Schedule to the Code which provides that on a charge of attempted murder a permissible verdict is that of assault. This was also the position that applied before the Code although then attempted murder would have been reduced to assault with intent to do grievous bodily harm.

*Crimes other than murder (and attempted murder) [s 238]*
Provocation is not a defence to such crimes but the court may regard the provocation as mitigatory.

See Guide pp 29-31 and 147-150.

*Provocation stemming from voluntary intoxication*

In terms of section s 224 if X, while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, this is only mitigatory.

*The battered wife syndrome*

Where a woman has been abused by her husband over a long period of time, she may lose her self-control and end up killing her husband. In a case of murder the defence of provocation could apply, either under the first or second rungs of the two-stage approach. The second rung is particularly useful in a case where a battered woman kills intentionally having lost her self-control.

Alternatively she may be able successfully to raise the defence that she should be found not guilty by reason of insanity or the defence of non-pathological mental incapacity. On these defence see under the defence of insanity.

---

**Defences and Mitigatory Factors Relating to Unlawfulness**

**Lawful authority**

[s 240-242]

The defence of lawful authority deals with situations where X’s conduct is lawfully authorised.

If such authority is of a public character, in that it stemmed from an enactment authorising the conduct in question, or from the accused’s lawful mandate as an employee or agent of the State, this defence will fully avail him or her so long as the conduct was in every respect authorised by the enactment, or the mandate conferred by the State was a lawful one.

The defence of “private authority” avails parents, guardians and heads or deputy heads of schools with respect only to the infliction of “moderate” corporal punishment upon minor children under their authority. However, a head or deputy head of a school has no authority to inflict corporal punishment upon a female pupil or student. Nor does such authority exist as between spouses.
Public authority [s 240]
The fact that X is authorised or permitted by an enactment to do or omit to do any thing is a complete defence to a charge alleging the commission of a crime of which that conduct is an essential element. However, this defence will only if X’s conduct was in all respects authorised or permitted by the enactment concerned;
The fact that X did or omitted to do any thing as a duly authorised official, employee or agent of the State and in the proper exercise of that authority shall be a complete defence to a charge alleging the commission of a crime of which that conduct is an essential element. However, this defence will only apply where it was lawful for the State to give the authority concerned.

Discipline of children [s 241]
“guardian” means a person, other than a school teacher in his or her capacity as such, who has the lawful custody, charge or care of a minor person, whether permanently or temporarily;
“minor”, in relation to a person, means that the person is under the age of eighteen years;
“school” includes an educational institution of any kind;
“school-teacher” means the head or deputy head of a school.

Parents and guardians [s 241(2)]
A parent or guardian has authority to administer moderate corporal punishment for disciplinary purposes upon his or her male or female minor child or ward and where the parent or guardian acts within the scope of that authority, the parent or guardian will have as a complete defence the defence of authority.

Cases
In R v Pondo & Anor 1966 RLR 478 (G) a parent caused the death of a child when he beat him for disciplinary purposes.

In S v Walata HH-84-89 a young mother burned the palms of hands of 7 year old son with flaming plastic because he had been caught stealing at his school. She was guilty of assault with intent to do grievous bodily harm as she had gone way beyond infliction of moderate corporal punishment for disciplinary purposes.

Schoolteachers (that is heads or deputy heads of schools) [s 241(2)]
A schoolteacher has authority to administer moderate corporal punishment for disciplinary purposes upon any minor male pupil or student and where the schoolteacher acts within the scope of that authority, the parent or guardian will have as a complete defence the defence of authority.

However, when administering corporal punishment upon a minor male pupil or student at his or her school, a schoolteacher shall comply with any lawful rules, regulations or administrative instructions which apply to the administration of corporal punishment at his or her school. [s 241(5)]
No schoolteacher or person acting under authority delegated to him or her by a schoolteacher may administer corporal punishment upon a female pupil or student.

In *S v Mutetwa* HH-373-87 a Headmaster had grossly exceeding the bounds of moderate chastisement.

In *S v Mangwarira* 1988 (2) ZLR 372 (S) X, a student teacher, was convicted of assault after she had caned a schoolboy on his buttocks. She admitted during her trial that she knew that only the headmaster was allowed to administer strokes. That although the right of a parent to administer reasonable punishment is clear under the common law, the right of a teacher is less certain. It may be, in the absence of any rule or regulation to the contrary, that even a student teacher has the right to inflict moderate chastisement on pupils under her control. The court held, however, that in view of the appellant's admission that the authority to impose corporal punishment had been reserved to the headmaster, it did not matter whether the reservation of authority was based on a Statutory Instrument or an internal school rule: in either case she could not rely on an authority which she acknowledged she did not have, and her defence of lawfulness failed. X was found guilty of assault.

*Delegation of authority* [s 241(3)]

Any person who administers moderate corporal punishment upon a minor person under authority delegated to him or her by a parent, guardian or schoolteacher will have a complete defence to a criminal charge if it would have been lawful for the parent, guardian or schoolteacher to have administered such punishment himself or herself.

*Factors for deciding whether punishment moderate* [s 241(6)]

The court must take into account all relevant factors including the following–

- the nature of the punishment and any instrument used to administer it;
- the degree of force with which the punishment was administered;
- the reason for the administration of the punishment;
- the age, physical condition and sex of the minor person upon whom it was administered;
- any social attitudes towards the discipline of children which are prevalent in the community among whom the minor person was living when the punishment was administered upon the minor person.

*Corporal punishment of spouse unlawful* [s 242]

It is not for a person to administer corporal punishment upon his or her spouse, whatever the nature of their marriage and wherever their marriage may have been contracted.

Lawful justification

This defence is not incorporated into the Criminal Law Code. It is to be found in section 42(2) of the Criminal Procedure and Evidence Act. Section 42(1) provides that where a person such as a police officer is authorised to arrest a person and that person resists or flees, the person attempting to effect the arrest may use reasonable force to overcome the resistance or effect the arrest. Section 42(2) goes on to provide that where a person whose arrest is attempted is killed as a result of the use of reasonably justifiable force the killing is lawful if the person was to have been arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule.

Cases

In *S v Mhomho* S-57-06 the appellant, a soldier, was charged with murder. It was argued for him that the killing was justifiable in terms of s 42(2) of the Criminal Procedure and Evidence Act. The appellant had been detailed, along with a policeman, to ambush a spot on the border suspected to be used by illegal border crossers. They did so at night. During the evening the deceased and another person approached the ambush spot and were challenged. The deceased attacked the accused and tried to take away his rifle but he and the other man fled when they saw the policeman. The accused fired a shot in the direction in which he could see the two men fleeing. The shot hit and killed the deceased. The court held that at the time the appellant discharged the firearm the deceased and his companion had committed the offence of assault in addition to a contravention of s 42(2) of the Immigration Act. However, for the appellant to have invoked the protection afforded by s 42(2) of the Criminal Procedure and Evidence Act, it had to be shown that he had taken other reasonable steps in the attempt to prevent the deceased from escaping before resorting to the use of the force that killed him. This the appellant did not do: he appeared to have simply fired the shot in the direction of the two people just because they were fleeing. He clearly acted precipitately and prematurely took the drastic action of shooting the deceased. He was negligent in that he failed to take reasonable steps to ascertain the whereabouts of the deceased before discharging his firearm and thus should be convicted of culpable homicide.

See also *R v Purcell-Gilpin* 1971 (1) RLR 241 (A); 1971 (3) SA 548 (RA); *S v Sanyangu* S-106-86; *S v Kware* S-85-93 on when force used to effect arrest is excessive. (The *Kware* case involved the use of force by a private farm security guard to prevent a thief from escaping with mealies he had stolen.)

Compulsion

*[ss 243&244]*
This can be a complete defence.

The defence of compulsion is available under certain stringent conditions to an accused who asserts that he or she was compelled to commit the crime with which the accused is charged.

Requirements [s 243(1)]

All the following requirements must be satisfied

- The compulsion consisted of a threat
  - unlawfully to kill him or her or cause him or her serious bodily injury or to kill or cause serious bodily injury to some other person; or
  - unlawfully to cause him or her financial or proprietary loss;
- X believed on reasonable grounds that implementation of the threat had begun or was imminent;
- the threat was not brought about through his or her own fault;
- X believed on reasonable grounds that he or she could not escape from or resist the threat and that his or her conduct was necessary to avert the implementation of the threat;
- by his or her conduct X did no more harm than was reasonably necessary to avert the implementation of the threat, and no more harm than was unlawfully threatened.

Voluntary association with criminals [s 243(2)]

Where X voluntarily associates himself or herself with one or more other persons knowing or realising that there is a real risk or possibility that they will involve X in the commission of a crime, any threat made against him or her by one or more of those other persons for the purpose of inducing him or her to commit a crime will be deemed to have been brought about by X’s own fault.

Additional requirements in case of murder [s 244]

- Compulsion will only be a complete defence if, in addition to the ordinary requirements for compulsion to be a defence, the following requirements are satisfied—
  - the compulsion took the form of a threat unlawfully to kill the accused or some other person immediately if the accused did not kill or assist in killing the deceased; and
  - the accused could not escape from or resist the threat; and
  - the accused had no warning of the threat to enable him or her to forestall it, whether by reporting the matter to the police or by other means.

Thus where the compulsion was not an immediate one, and took the form of a threat to kill a hostage, or X’s spouse, child or other relative unless X killed a third party, X may not avail himself or herself of the defence of compulsion if he or she did not report the threat to the police.

If all these requirements are satisfied, the defence of compulsion shall be a complete defence to a charge of murder, whether the accused is charged as an actual perpetrator or as an accomplice.

Consent

[s 245-251]

Crimes requiring absence of consent [s 245(2)]

Some crimes such as rape, aggravated indecent assault and indecent assault can only be committed if X performed the sexual act with the consent of Y. Thus the fact that Y consented would be a full defence to such a charge, provided that Y had the capacity to consent and the consent was true consent. For consent to avail as a defence

- Y must have consented prior to the conduct, not as ratification afterwards;
- Y must be capable in law of giving such consent and able to understand the nature and possible consequences of the conduct and to give informed consent;
- Y’s consent must be real and is not induced by threats, force, fraud or mistake intentionally or knowingly induced by the person charged with the crime.

Crimes that do not require absence of consent [s 245(1)]

Where Y to any conduct which is likely to cause harm to his or her person, proprietary rights or other interests, Y’s consent will be a complete defence if —

- the interests of the community as a whole are not adversely affected by the conduct to any substantial degree;
- Y consented given prior to the conduct, not as ratification afterwards;
- Y is capable in law of giving such consent and is able to understand the nature and possible consequences of the conduct and to give informed consent;
- Y’s consent was real and is not induced by threat, force, fraud or mistake intentionally or knowingly induced by X;
- the giving of the consent is not contrary to any law or to public policy.

Killing [s 246]

It is not lawful to a person to consent to being killed.

Infliction of serious bodily harm [s 246]

Usually it is not lawful for a person to consent to the infliction of serious bodily harm upon him or her. There are some exceptions to this rule, however. For instance, a person can lawfully consent to the carrying out of a major medical operation for therapeutic purposes.

Medical operations for therapeutic purposes [s 247]

This deals with consent to medical operations or treatment carried out by a medically qualified person (doctors and nurses) to cure or alleviate any disease or disability from which a patient suffers or is likely to suffer.

Consent to or authorisation for the medical procedure can be a complete defence to a charge of assault or murder. As regards murder the doctor may realise that there is a risk that the medical procedure might result death but the patient is gravely ill and the procedure offers the only chance
of saving the patient’s life. If the patient has consented to the procedure knowing of the risk of death, the consent will be a defence to the charge of murder.

Consent is a defence only if—

- the treatment is carried out competently in accordance with recognised medical procedures;
- the patient consented prior to the conduct, not as ratification afterwards;
- the patient is capable in law of giving such consent and able to understand the nature and possible consequences of the conduct and to give informed consent;
- the patient’s consent is real and is not induced by threats, force, fraud or mistake intentionally or knowingly induced by the person charged with the crime.

**Persons who can consent or give authorisation**

<table>
<thead>
<tr>
<th>Patient</th>
<th>Person who can give consent to medical procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patient capable in law of consenting</td>
<td>Patient</td>
</tr>
<tr>
<td>Patient incapable in law of consenting</td>
<td>Patient’s parent, guardian, spouse or any other person capable in law of giving consent on behalf of the patient</td>
</tr>
<tr>
<td>Patient who is minor where parent or guardian unreasonably refusing to consent to necessary medical treatment of minor</td>
<td>On application, magistrate may authorise medical treatment</td>
</tr>
<tr>
<td></td>
<td>Section 76 of Childrens’ Act provides that after due inquiry, including hearing from parent or guardian where reasonably practicable, if magistrate is satisfied that the treatment is necessary in the health interests of the minor, magistrate may order the treatment to take place.</td>
</tr>
</tbody>
</table>

**Urgent or emergency treatment [s 247(3)]**

The medically qualified person may give medical treatment or perform an operation without obtaining consent or authority, if, on reasonable grounds, the medically qualified person believes that—

- the patient urgently requires the treatment or operation to cure or alleviate any disease or disability from which the patient is suffering or is reasonably suspected of suffering; and
- it is not practicable in the circumstances to obtain the consent or authority normally required.

Where the treatment or operation took place in these circumstances this will be a complete defence to assault or murder, provided that the treatment or operation is carried out competently in accordance with recognised medical procedures.
Medical treatment for non-therapeutic purposes [s 248]

Consent is a full defence to a charge of murder or assault where a medically qualified person performs on a patient

- a sterilisation operation on a patient;
- medical treatment or an operation that is not to cure the patient or alleviate any disease or disability of the patient.

Thus, for instance, a patient can consent to cosmetic surgery, an operation that is not for therapeutic purposes.

Consent is a defence only if–

- the treatment is carried out competently in accordance with recognised medical procedures;
- the patient consented prior to the conduct, not as ratification afterwards;
- the patient is capable in law of giving such consent and able to understand the nature and possible consequences of the conduct and to give informed consent;
- the patient’s consent is real and is not induced by threats, force, fraud or mistake intentionally or knowingly induced by the person charged with the crime.

Clinical testing of drugs

There are strict controls over the clinical testing of drugs and medicines and such tests can only be carried out upon persons who have given their consent to the testing being carried out upon them. The legislation that governs clinical testing of drugs is the Medicines and Allied Substances Control Act.

Sporting injuries [s 249]

A person who takes part in any lawful sporting activity is to have consented to undergo the risk of sustaining any injury or destruction or loss of property which is normally inherent in participation in such sporting activity.

A person cannot consent to death or injury arising out of an illegal “sporting” activity such as a duel with pistols or swords where the participants agree to fight until one of them is killed or injured.

Consent is not a defence where

- X inflicted deliberately inflicts the injury, destruction or loss in contravention of the rules of the sporting activity concerned; and
- the injury, destruction or loss does not fall within the risks normally inherent in participation in the sporting activity concerned.

Injuries from customary or religious practices [s 250]

X will have a full defence if X inflicts with Y’s consent slight bodily injuries upon Y

- in accordance with the customs or traditional practices of the community to which Y belongs; and
for the purposes of or in accordance with the practice of his or her religion or custom.

“slight bodily injury” includes the circumcision of a male person but does not include the practice of genital mutilation of a female person commonly known as “female circumcision”.

Consent given on behalf of those incapable of giving consent [s 251]

Y may be incapable in law of giving consent because, for instance, Y is a minor or is insane or may be physically unable to give consent because he or she is unconscious.

Where this is the case consent given by the person’s parent, guardian, spouse or any other person capable in law of giving consent on his or her behalf shall be as effective as if the consent had been given by the person himself or herself.

Refusal by parent or guardian to consent or where consent cannot be obtained within reasonable period

This situation is dealt with in the Children’s Act as follows—

76 Consent to surgical or other treatment

(1) Where the consent of a parent or guardian is necessary for the performance of any dental, medical, surgical or other treatment upon a minor and the consent of the parent or guardian is refused or cannot be obtained within a period which is reasonable in the circumstances, application may be made to a magistrate of the province where the minor is or is resident for authority to perform the treatment.

(2) A magistrate to whom an application in terms of subsection (1) is made may—

(a) after due inquiry and after affording the parent or guardian concerned a reasonable opportunity of stating his reasons for refusing to give the necessary consent or without affording such person such opportunity if his whereabouts are unknown or if in the circumstances it is not reasonably practicable to afford him such opportunity; and

(b) if satisfied that any dental, medical, surgical or other treatment is necessary or desirable in the interests of the health of the minor;

by order in writing authorize the performance at a hospital or other suitable place upon the minor concerned of such dental, medical, surgical or other treatment as may be specified in the order.

(3) Where authority for the performance of any treatment has been given in terms of subsection (2), the person legally liable to maintain the minor concerned shall be liable for the cost of the treatment.

(4) Notwithstanding any other law, a young person may, without the assistance of his parent or guardian, consent to donate blood for medical or scientific purposes:

Provided that no such consent shall be valid if—

(a) the donation of his blood would endanger the young person’s health or life; or

(b) the young person’s parent or guardian has informed the person who is to take the blood that he does not consent to the donation.

If the doctor went ahead and treated a gravely ill child to save its life and did so without parental consent or authorization from a magistrate because the child would have died if it had not received immediate medical intervention, the doctor would be able to raise the defence of necessity.

See Guide pp 37-39 and 156-157
Self-defence or defence of another

Self-defence and defence of another can be a complete defence.

Our law recognises that the infliction of harm upon unlawful attackers is permissible to the extent that such harm was reasonably necessary to ward them off.

Requirements [s 253]

This defence is a complete defence to if all the following requirements are met:

- when X engaged in the conduct, the unlawful attack had commenced or was imminent or X believed on reasonable grounds that the unlawful attack had commenced or was imminent;
- X’s conduct was necessary to avert the attack or X believed on reasonable grounds that that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack;
- the means X used to avert the unlawful attack were reasonable in all the circumstances he or she;
- any harm or injury caused by his or her conduct—
  - was caused to the attacker and not to any innocent third party; and
  - was not grossly disproportionate to that liable to be caused by the unlawful attack.

“unlawful attack” is defined as any unlawful conduct which endangers a person’s life, bodily integrity or freedom.

Case on whether obliged to flee

In S v Mothoana 1992 (2) SACR 383 (O) X was attacked by C with a knife after C had caught X in bed with his wife. C had attempted to stab at C several times. X then took out his own knife and stabbed C several times. He was convicted of assault with intent to do grievous bodily harm.

The appeal court held that he was not obliged to flee as found by the trial court as it would have been dangerous for him to have attempted to flee.

Court take into account X’s predicament

In determining whether or not the requirements for the defence have been satisfied, the court must take due account of the circumstances in which X found himself or herself, including any knowledge or capability X may have had and any stress or fear that may have been operating on his or her mind.

The courts have stressed again and again that they do not adopt an armchair approach to situations of self-defence. It would be wrong for the courts to fail to take into account that fact that X under attack is in a pressurised and dangerous situation. When dealing with the question of what a reasonable person would have done in those circumstances, the courts must try to place
themselves in the predicament faced by X. They must be aware of the fact that X who is already under attack will have to take immediate defensive measure and will not have the time to ponder upon what weapon and how much force he should use. If a person is faced with the terrifying prospect of an attacker who is about to kill or gravely injure him, he will have to respond immediately with whatever weapons are to hand. Thus where a mob, intent upon killing or causing serious bodily harm set upon a person with sticks and stones, the defender may be justified in using a fire-arm to defend himself. But if a person is threatening to slap another person across the face, it would not be justified to shoot and kill the attacker.

Cases on avoiding armchair approach

In S v Phiri S-190-82 at night time D had gained entry into X’s house by threatening to shoot X through the window. D assaulted P’s wife. X reacted by hitting D with a knobkerrie several times. On appeal the conviction was set aside, the appeal court holding that X had used reasonable means to defend himself and his wife against the intruder. The appeal court said warned against using an armchair test from refined atmosphere of court.

In S v Mahingaidze S-79-84 youth brigade members surrounded X, a policeman. The youth brigade members had uttered threats against his life. X ended up shooting the youth brigade leader in stomach. He had previously fired two warning shots first. X believed life to be in danger. The appeal against conviction for attempted murder was successful. The appeal court held that the action taken by X was reasonable.

In S v Mandizha S-200-91 X had been convicted of murdering his father who had a history of family violence and was attacking him with an iron bar and axe. He wrested away the iron bar and hit his father quickly three times on the head. It was unrealistic to expect X to stop after one blow to see whether his father’s murderous attack would stop. He had neither the time nor opportunity to rationalise the degree of force and number of blows that would be necessary to avert the danger to his own life. The State had failed to prove that X did or ought to have realised that he was exceeding the bounds of self-defence, to sustain a conviction for either murder or culpable homicide.

In S v Banana 1994 (2) ZLR 271 (S) X was found not guilty of culpable homicide. He had shot at armed and determined housebreakers at night. The court held that he had killed in defence of himself and of his property and the defence applied. The court said that the armchair approach to this sort of situation must be avoided.

Partial defence to murder [s 254]

X will have a partial defence to a charge of murder and will be found guilty of culpable homicide instead of murder if

- X was defending himself or herself or another person against an unlawful attack;
• All the requirements for this defence of self-defence or defence of another were satisfied except that the means X used to avert the unlawful attack were not reasonable in all the circumstances.

*Mistaken belief that under attack* [s 255]

If X genuinely and on reasonable grounds, but mistakenly, believes that he or she is defending himself or herself or another person against an unlawful attack, he or she shall be entitled to a complete or partial defence to any criminal charge in all respects as if his or her belief were in fact correct.

It should be noted that for this defence to avail the mistake must not only be genuine but also it must be reasonable.

*Cases on mistaken self-defence*

In *S v Moyo* S-45-84 X was pursued by a group of people who accused him of being a dissident. The pursuers were armed. X took refuge in someone else’s house and armed himself with kitchen knife. X stabbed and killed two people as they entered. X believed that these persons were pursuers who were intent on killing him. It turned out that these persons were in fact people who lived in the house in which he had taken refuge and that they had entered the house in order to expel X from the house. X was charged with two counts of murder. On appeal the Appeal court found that X had reasonably believed that his life was threatened and the means taken in circumstances were not unreasonable. He was acquitted on appeal.

In *S v Motleleni* 1976 (1) SA 403 (A) X believed on reasonable grounds that D had him cornered and that he intended to stab him. X struck D first. The conviction for murder set aside on appeal.

In *S v Chauke* 1991 (2) SACR 251 (B) the court found that the intention to kill had not been proved on charge of murder because it was reasonably possible, on the facts, that the X had reasonably believed that he was in danger of being seriously injured by the deceased and that, in shooting the deceased, he was acting in justifiable self-defence.

See *Guide* pp 42-44 and 159-162.

---

**Defence of property**

*[s 256-259]*

Defence of property can be a full defence to a crime, but where the crime charged is murder there are additional stringent requirements for this defence. These stringent requirements are there to try to ensure that killing is only used as a last resort measure to protect property which is of vital importance to the accused and to signify that greater value is usually placed on human life over that of property.

*Definitions* [s 256]
General requirements [s 257]
Defence of property will be a complete defence to a crime with X is charged with if X is charged with a crime for his or her action in defending his or her property if all the following requirements are satisfied—

- when X did or omitted to do the thing, the unlawful attack had commenced or was imminent;
- X’s conduct was necessary to avert the unlawful attack;
- the means X used to avert the unlawful attack were reasonable in all the circumstances;
- any harm or injury caused by X’s conduct—
  - was caused to the attacker and not to any innocent third party; and
  - was not grossly disproportionate to that liable to be caused by the unlawful attack.

Killing in defence of property [s 258]
Where X is charged with a crime involving the killing of another person X is not entitled to rely upon defence of property unless all the following requirements are satisfied—

- X resorted to killing after taking all other possible steps to protect the property concerned;
- the property concerned could not have been defended by any means except by killing;
- the property concerned was of vital importance to X;
- X believed on reasonable grounds that he or she would not receive adequate compensation for any destruction, damage or injury caused to the property concerned by the unlawful attack.

In determining whether or not these requirements have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.

In determining whether or not any means used by a person to avert an unlawful attack were reasonable, or whether or not any harm or injury caused to an attacker was proportionate to that liable to be caused by an unlawful attack, a court will have regard to the nature of the property which the person was trying to protect and its value to him or her.

There is no case in Zimbabwe dealing with the setting up of a lethal trap to protect against burglars where the trap has caused the death of a burglar. There are two cases where lethal traps have been set up to protect property but in both cases employees were killed. In R v Puttock 1967 RLR 186 (A) X had rigged up an electrical fence to protect his pigs against theft. An employee
had touched the fence thinking the current was off and had died. The employer was found guilty of culpable homicide because he had failed to take proper precautions to protect his employees against being killed by this trap. In *S v Mlambo* 1994 (2) RLR 410 (S) X had set up an electrified fence around his vegetable patch to keep wild animals out. Again an employee had touched the wire and had died. The court found X guilty of culpable homicide. It found that X had introduced an extreme hazard onto his property and he was obliged to take reasonable precautions to prevent harm to his employees. He could have used non-lethal current and a red warning light to show when current still switched on and provided safety clothing to employees. He had failed to employ reasonable precautions.

There is a South African case dealing with a situation in which a burglar was killed by a shotgun trap. The case is that of *S v Van Wyk* 1967(1) SA 488 (A). X had suffered repeated break ins at his store which was situated in a remote location. All previous protective measures had failed. Burglar bars had been broken, his watchdog was killed and his night watchman had been intimidated and driven away. The police had been unable to provide constant surveillance of store. Facing financial ruination and at his wits end, he had set out a shotgun trap set up with knowledge of police. The shotgun trap was intended to be triggered by a burglar breaking in through a window. The shotgun blast was supposed to hit the burglar in the legs but in fact hit him in the chest and killed him. He had posted a warning notice about the trap but in dimly lit place and not in local languages. X was acquitted with the majority finding that he had not exceeded the bounds of private defence.

Even where the trap is set up to protect property against thieves, the defence will only apply where the means used are reasonable and were necessary to avert the “attack”. The courts will be likely to be reluctant to condone easily the setting up of lethal traps because of the potentiality of the trap harming innocent third parties and the fact that it is usually possible to set up a trap that protects without involving the causing of death.

*When defence of property partial defence to murder* [s 259]

If X killed Y to defend his or her or another’s property and X is charged with murder, X will be found guilty only of culpable homicide if all the requirements specified for defence of property to be a defence to a charge of murder are satisfied except that the means X used to avert the unlawful attack were not reasonable in all the circumstances.

See *Guide* pp 44 and 162-164.

---

**Entrapment**

[s 260]

Entrapment is not a defence but can only be mitigatory.

This sets out the existing legal position on entrapment reflected in a number of Supreme Court decisions and this is that entrapment never constitutes a defence but is only taken into account in mitigation of sentence.
**Entrapment no defence**

It is not a defence to a crime that X was trapped into committing the crime concerned, that is to say that the police or other authority or person, by using any inducement or encouragement, caused X to commit it for the purpose of obtaining evidence of its commission.

**When entrapment mitigatory**

Where the court considers that unfair or undesirable entrapment methods were used by the police or other authority or person, it may take the manner of such entrapment into account as a factor in mitigation of sentence.

See Guide pp 45 and 163-164.

---

**Impossibility**

[s 261]

Impossibility can be a complete defence.

The defence of impossibility is of extremely limited application, being relevant only to those crimes defined by a failure to do something.

**Requirements** [s 261(1)]

Where X is charged with a crime of which an essential element consists of a failure, omission or refusal to do anything, the fact that it was physically impossible (not merely extremely difficult) for X to do that thing is a complete defence to the charge if—

- the impossibility was absolute, that is to say, if it was objectively impossible for anyone in X’s position to have done that thing; and
- the impossibility was not due to X’s own fault.

**Difficulty in complying with law** [s 261(3)]

When imposing sentence upon X for a crime, a court can take into account any difficulty experienced by X in complying with a law.


---

**Necessity**

[s 262-266]

Necessity can be a complete defence.

The provisions on the defence of necessity are similar to those for the defence of compulsion, compulsion being a kind of necessity. There are very few situations not covered by the defence of
compulsion where the defence of necessity will apply. If the case involves a threat that would give rise to the defence of compulsion, it should be dealt with under compulsion and not under necessity.

**General requirements** [s 263]

If X’s action or inaction was necessary to avoid harm to X or to another, necessity will be a complete defence if all the following requirements are satisfied—

- the harm which he or she sought to avoid would have resulted in—
  - death or serious bodily injury to X or to another; or
  - considerable financial or proprietary loss to X;

and

- X believed on reasonable grounds that the harm had started to occur or was imminent; and
- the harm did not arise through his or her own fault; and
- X believed on reasonable grounds that his or her conduct was necessary to avoid the harm and that there was no other feasible way of avoiding it; and
- by his or her conduct X did no more harm than was reasonably necessary to avoid the harm, and the harm X did was not disproportionate to the harm he or she sought to avoid.

In determining whether harm would cause considerable financial or proprietary loss to a person, a court shall have regard to the financial or proprietary resources of the person concerned.

**When necessity complete defence to murder** [s 264]

If X is charged with murder as the actual perpetrator or as an accomplice necessity is only a complete defence to the charge of murder if not only the general requirements for this defence are satisfied but also all the following requirements are also satisfied—

- the harm which X sought to avoid would have resulted X’s death or in the death of his or her spouse, parent or child; and
- X’s conduct was necessary to avoid the death and there was no other feasible way of avoiding it; and
- X had no warning of the harm to enable him or her to forestall it by other means.

**When necessity partial defence to murder** [s 265]

If X is charged with murder and all the requirements for the defence of necessity are satisfied except that by his or her conduct X did more harm than was reasonably necessary to avoid the harm that X sought to avoid, X will be guilty of culpable homicide.

**Other crimes** [s 266]

In relation to all cases other than those specified above, necessity is not be a defence but will merely be a factor to be taken into account in the assessment of sentence.

See Guide pp 40 and 157-158.
This defence can be a complete defence.

Sections 267 and 268 set out the requirements for obedience to superior orders to be a complete defence to a lawful and an unlawful order. There are obviously more stringent requirements where the order that was carried out is illegal. To try to prevent members of disciplined forces from being used as agencies to carry out orders to commit atrocities and other human rights abuses, such as massacring innocent civilians, the defence of obedience to orders will not apply where the order was not so manifestly illegal that a reasonable person in his or her position would have refused to obey it.

**Definitions [s 267]**

| active operations | ➢ active service during any war in which Zimbabwe is engaged; or  
|                  | ➢ counterinsurgency operations; or  
|                  | ➢ the suppression of a riot or public disturbance or public violence; or  
|                  | ➢ the prevention of a disturbance within or escape from a prison. |
| disciplined force | ➢ the Defence Forces; or  
|                  | ➢ the Police Force; or  
|                  | ➢ the Prison Service; or  
|                  | ➢ any other force organised by the State which has as its sole or main object the preservation of public security and of law and order in Zimbabwe. |
| lawful order      | any command, direction or order—  
|                  | ➢ of a routine, permanent or continuing nature that is properly made for any disciplined force by or under any enactment or in terms of any authority given by or under any enactment; or  
|                  | ➢ given on a particular occasion or for a particular purpose by a member of rank of a disciplined force within the ordinary and lawful scope of that member’s authority |
| member            | in relation to a disciplined force includes a person who is assisting members of the disciplined force, whether voluntarily or otherwise and whether or not he or she is |
| member of rank | in relation to a disciplined force, means a member in lawful authority over any other member. |
| remunerated for his or her services, and who is subject to orders given by other members of the disciplined force. |

**Requirements for obedience to lawful orders to be complete defence** [s 268]
If X was obeying a lawful order X will have a complete defence to the charge if all the following requirements are satisfied—

- when he or she did or omitted to do the thing he or she was a member of a disciplined force; and
- the order was given to him or her by a member of rank of a disciplined force, whether or not that person was a member of the same disciplined force.

**Requirements for obedience to illegal orders to be complete defence** [s 269]
If X was obeying an unlawful order X will have a complete defence, even if X realised that the order he or she was obeying was illegal to the charge if all the following requirements are satisfied—

- at the time of the conduct in question X was a member of a disciplined force engaged in active operations; and
- the order was given to X by a member of rank of a disciplined force, whether or not that person was a member of the same disciplined force; and
- X would have been liable, or believed on reasonable grounds that he or she would have been liable, to disciplinary action if he or she had refused to obey the order; and
- the order was not so manifestly illegal that a reasonable person in his or her position would have refused to obey it; and
- his or her conduct was no more than was necessary to carry out the order.

See *Guide* pp 40-41 and 158-159.

---

**Trivialities**

[s 270]
This defence permits an accused to be acquitted if the harm to a person or the community occasioned by the crime in question is so trivial as not to warrant a conviction. In practice, this defence has only very limited application.

**Factors** [s 270(2)]
In deciding whether the crime is of a sufficiently trivial nature to justify an acquittal the court must take into account all relevant factors including the following—

- the extent of any harm done by the commission of the crime to any person or to the community as a whole; and
the extent to which it appears, from the enactment which created the crime, that the lawmaker wished to prohibit conduct such as that perpetrated by the accused; and
whether or not an acquittal will encourage other persons to commit the crime concerned.

When court should acquit [s 270(3)]
A court must only acquit X if the conduct is of a trivial nature in relation to the most serious conduct prohibited by the particular provision of the enactment concerned.

Case
In S v Dzimuri & Ors 1997 (2) ZLR 27 (H) the court said that the application of the de minimis principle is a value judgment. Crimes affect the interests of the community as a whole, not merely those of the individual complainant. If the harm done is very trifling, the community is not really affected. In determining the application of the principle, the judicial officer is entrusted with a policy decision to be exercised according to all the relevant circumstances of the case.

See Guide pp 45 and 164-165.

Unavoidable accident
[s 271-272]

Situations covered [s 271]
An unavoidable accident is a circumstance or event so unlikely to occur that a reasonable person in the position of X would not take steps to guard against it. It includes such situations as—

- a heart attack or epileptic blackout suffered whilst driving a motor vehicle by a person who has not previously suffered from one and who has no reason to suppose that he or she might do so;
- a swarm of bees flying into a moving motor vehicle and stinging the driver;
- a stone thrown up by a passing vehicle and striking and stunning the driver of a moving motor vehicle.

Requirements [s 272]
This is a complete defence if to the charge if—

- the unavoidable accident did not occur through X’s own fault; and
- a reasonable person, faced with the same unavoidable accident in the same circumstances, would not have been able to avoid the same conduct that would have constituted the crime.

Cases
Motor vehicle cases
In *R v Shevill* 1964 RLR 292 (A); 1964 (4) SA 51 (SR) the court stated that it is negligent to continue to drive when drowsy. X was found guilty of culpable homicide after he had fallen asleep at the wheel and caused some deaths.

In *S v Crockart* 1971 (1) RLR 260 (A); 1971 (2) SA 496 (RA) X was driving a car. His wife struck a match and the flaming match head broke off and landed between X’s legs. He panicking and took his eyes off the road momentarily. He veered across the road and caused an accident. The court held that X should, by exercise of reasonable care and skill, have coped with emergency while maintaining car on its proper course. X was found guilty of negligent driving.

In *S v Lombard* 1964 (4) SA 346 (T) a horsefly entered the cab of a vehicle and stung the driver, X, on the cheek. The driver who was allergic to insect stings panicked, lost control of the vehicle and had an accident. X was found guilty of negligent driving. The court found that a reasonable driver would not have lost control. He would have applied his brakes immediately and brought vehicle to a halt.

In *S v Erwin* 1974 (3) SA 438 (C) a bee stung, X, a driver on the cheek. X instinctively pulled away and bumped his spectacles against the window, breaking his lens. X then released the steering wheel and grabbing spectacles to protect eyes. The vehicle went out of control and caused an accident X was found guilty of negligent driving, the court finding that the error of judgment made while in a state of emergency was not one which a reasonable driver would have made.

In *S v van Rensburg* 1987 (3) SA 35 (T) X had had blood tests which had led to a fall in his blood sugar levels. His doctor did not warn him that this might happen and it was not reasonably foreseeable. X was thus not responsible for the accident and he was found not guilty of negligence.

In the civil case of *S v Wessels & Anor* 1985 (4) SA 153 (C) X was found guilty of negligence. While driving he had suffered a diabetic coma due to low blood sugar. He had suffered previous attack resulting in an accident. He knew of his condition and how to control even if not been told this by his doctor.

See *Guide* pp 17
COMPETENT VERDICTS

Sections 273 to 276 permit the courts in specified cases to convict an accused of a crime other than the one with which he or she was originally charged.

The verdicts that are competent for specific crimes are listed under those specific crimes. What follows are some general provisions relating to competent verdicts.

<table>
<thead>
<tr>
<th>Charge</th>
<th>Competent verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any crime</td>
<td>Corresponding unfinalised crime or assisting perpetrator of crime</td>
</tr>
<tr>
<td>Crime that contains essential elements of another crime</td>
<td>The other crime if facts support such conviction</td>
</tr>
</tbody>
</table>

*Sentence imposable where person found guilty on competent verdict [s 276]*

This provides that, if an accused is found guilty of a crime other than the one with which he was originally charged, he or she may not suffer a sentence greater than the maximum sentence for which he or she was originally liable.
Sections 277 to 284 provide for general matters.

**Criminal liability of corporations and associations and of members and agents of corporations and associations**

[s 277]

This re-enacts s 385(1), (2), (6) and (8) of the Criminal Procedure and Evidence Act.

**Definitions**

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>director</td>
<td>in relation to a corporate body, means a person who—</td>
</tr>
<tr>
<td></td>
<td>➢ controls or governs that corporate body, whether lawfully or otherwise; or</td>
</tr>
<tr>
<td></td>
<td>➢ is a member of a body or group of persons which controls or governs that corporate body, whether lawfully or otherwise; or</td>
</tr>
<tr>
<td></td>
<td>where there is no such body or group, a person who is a member of the corporate body.</td>
</tr>
</tbody>
</table>

**Criminal liability of corporate body**

For the purposes of imposing criminal liability upon a corporate body,

➢ any conduct on the part of a director or employee of the corporate body; or any person acting on instructions or with permission, express or implied, given by a director or employee of the corporate body;

➢ in the exercise of his or her power or in the performance of his or her duties as such a director, employee or authorised person, or in furthering or endeavouring to further the interests of the corporate body,

will be deemed to have been the conduct of the corporate body, and if the conduct was accompanied by any intention on the part of the director, employee or authorised person, that intention shall be deemed to have been the intention of the corporate body.

**Criminal liability of director or employee of corporate body**

A director or employee of a corporate body is liable to be personally prosecuted and punished in the following circumstances—

Where there has been conduct which constitutes a crime for which a corporate body is or was liable to prosecution, that conduct will be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body, and if the conduct was accompanied
by any intention on the part of the person responsible for it, that intention will be deemed to have been the intention of every other person who at the time was a director or employee of the corporate body—

This provision will not apply if it is proved that a director or employee of the corporate body took no part in the conduct, this provision will not apply to him or her.

*Criminal liability of member and employees of association*

For the purposes of imposing criminal liability upon members and employees of an association of persons which is not a corporate body,

- any conduct on the part of a member or employee of the association; or any person acting on instructions or with permission, express or implied, given by a member or employee of the association;
- in the exercise of his or her power or in the performance of his or her duties as such a member, employee or authorised person, or in furthering or endeavouring to further the interests of the association,

will be deemed to have been the conduct of every other person who at the time was a member or employee of the association, and if the conduct was accompanied by any intention on the part of the director, employee or authorised person, that intention will be deemed to have been the intention of every other person who at the time was a member or employee of the association.

This provision will not apply—

- if it is proved that a member or employee of the association took no part in the conduct;
- if the association is controlled or governed by a committee or other similar governing body, any person who was not at the time of the conduct a member of that committee or other body.

A member or employee who is criminally liable for any conduct in terms of this provision will be liable to be prosecuted and punished personally for the crime concerned.

*Other laws imposing liability*

These provisions will not limit any other law that imposes criminal liability upon corporate bodies and associations and their directors, employees and members.

**Conviction or acquittal no bar to civil or disciplinary proceedings**

[§ 278]

This codifies the common law rule that a conviction or acquittal in respect of a crime will not bar civil proceedings at the instance of the person who suffered any loss or injury in consequence of the conduct constituting the crime. Nor shall such conviction or acquittal be a bar to disciplinary proceedings in certain cases.
Concurrent and alternative charges

[§ 279]
Various clauses in the Code provide that a person accused of a particular crime may be charged with one or more different crimes “alternatively”, “concurrently” or “alternatively or concurrently”. This section explains how these words are to be interpreted when framing the relevant indictment. In doing so it expands upon § 145 of the Criminal Procedure and Evidence Act.

Standard scale of fines

[§ 280]
This re-enacts and replaces § 346A of the Criminal Procedure and Evidence Act.

Reference in enactments to common law crimes

[§ 281]
This section provides for the substitution of references to common law crimes in any enactment to the corresponding references under the Code.

Amendment of Acts

[§ 282]
This provides for the amendment of several enactments affected by the provisions of the Code.

Repeal

[§ 283]
This provides for the amendment of several enactments affected by the provisions of the Code.

Savings

[§ 284]
This section saves the validity of anything done or suffered under the Roman-Dutch criminal law before its repeal by the Code, and provides that the repeal of that law will not affect the validity, investigation or prosecution of any common law crime committed before the commencement of the Code. However, no sentence for a pre-existing offence may exceed that for the corresponding offence provided in this Code.
First Schedule

This assigns monetary values to each level of fine specified in this Code and any other enactment. The current levels of fines contained in Statutory Instrument 109 of 2008) and effective from 1 August 2008 are these–

<table>
<thead>
<tr>
<th>Level</th>
<th>Monetary Amount in US dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>3</td>
<td>20</td>
</tr>
<tr>
<td>4</td>
<td>50</td>
</tr>
<tr>
<td>5</td>
<td>100</td>
</tr>
<tr>
<td>6</td>
<td>200</td>
</tr>
<tr>
<td>7</td>
<td>300</td>
</tr>
<tr>
<td>8</td>
<td>400</td>
</tr>
<tr>
<td>9</td>
<td>500</td>
</tr>
<tr>
<td>10</td>
<td>600</td>
</tr>
<tr>
<td>11</td>
<td>900</td>
</tr>
<tr>
<td>12</td>
<td>1000</td>
</tr>
<tr>
<td>13</td>
<td>2000</td>
</tr>
<tr>
<td>14</td>
<td>5000</td>
</tr>
</tbody>
</table>

Second Schedule

This co-relates all the crimes specified in the Code with the corresponding provisions of the Code creating or re-enacting those crimes.

Third Schedule

This enumerates the various acts constituting the crime of “criminal nuisance” under clause 37. Most of these re-enact paragraphs (a) to (w) of section 3 (2) of the Miscellaneous Offences Act.

Fourth Schedule
This sets out the permissible alternative verdicts that may be returned by a court in substitution for crimes originally charged.

Fifth Schedule

This co-relates the repealed common law crimes with the corresponding crimes under the Code.

CRIMINAL LAW CODE – FIFTH SCHEDULE
MAXIMUM PENALTIES THAT MAY BE IMPOSED FOR CERTAIN COMMON-LAW OFFENCES

Under section 284(2) of the Criminal Law Code, where a person’s trial commenced before the date of commencement of the Code and the person is charged an offence listed in the first column of the table below, he or she cannot be sentenced to a penalty that is more severe than the one specified in the second column of the table. A trial is generally regarded as commencing when the accused person is called upon to plead to the charge.

Note that the penalties listed in the second column below are the maximum penalties that may be imposed; they are not mandatory minimum penalties, except where that is specifically stated. In other words, the convicted persons may be sentenced to lesser punishments.

<table>
<thead>
<tr>
<th>Common-law crime</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abduction</td>
<td>Level 7 fine or 2 years’ imprisonment or both, where a child was abducted by a parent or close relative and there was no violence</td>
</tr>
<tr>
<td></td>
<td>In all other cases, life imprisonment [s 93]</td>
</tr>
<tr>
<td>Abortion</td>
<td>Level 10 fine or 5 years’ imprisonment or both [s 60]</td>
</tr>
<tr>
<td>Administering a poisonous or noxious substance</td>
<td>Level 14 fine or 10 years’ imprisonment or both [s 89]</td>
</tr>
<tr>
<td>Arson</td>
<td>Fine of level 14 or twice the value of the property damaged, or 25 years’ imprisonment, or both [s 140]</td>
</tr>
<tr>
<td>Assault with intent to inflict grievous bodily harm</td>
<td>Level 14 fine or 10 years’ imprisonment or both [s 89]</td>
</tr>
<tr>
<td>Bestiality</td>
<td>Level 14 fine or 1 year’s imprisonment or both [s 74]</td>
</tr>
<tr>
<td>Offence</td>
<td>Description</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Bigamy</td>
<td>Level 6 fine or 1 year’s imprisonment or both, where a party to a monogamous marriage purports to enter into another marriage.</td>
</tr>
<tr>
<td></td>
<td>Level 5 fine, where a party to a polygamous marriage purports to enter into a monogamous marriage [s 104]</td>
</tr>
<tr>
<td>Blasphemy</td>
<td>Level 6 fine or 1 year’s imprisonment or both [s 42]</td>
</tr>
<tr>
<td>Bribery</td>
<td>Fine of level 14 or 3 times the value of any consideration obtained or given, or 20 years’ imprisonment, or both [s 170]</td>
</tr>
<tr>
<td>Common assault</td>
<td>Level 14 fine or 10 years’ imprisonment or both [s 89]</td>
</tr>
<tr>
<td>Compounding</td>
<td>Level 6 fine or 1 year’s imprisonment or both [s 184(1)(h) &amp; (iii)]</td>
</tr>
<tr>
<td>Contempt of court</td>
<td>Level 6 fine or 1 year’s imprisonment or both [s 182]</td>
</tr>
<tr>
<td><em>Crimen injuria</em></td>
<td>Level 6 fine or 1 year’s imprisonment or both [s 95]</td>
</tr>
<tr>
<td>Criminal defamation</td>
<td>Level 14 fine or 2 years’ imprisonment or both [s 96]</td>
</tr>
<tr>
<td>Culpable homicide</td>
<td>Level 14 fine or life imprisonment or both [s 49]</td>
</tr>
<tr>
<td>Defeating or obstructing the course of justice</td>
<td>Level 10 fine or 5 years’ imprisonment or both, where the offence involves—                                                                                                                      • conduct that causes judicial proceedings to be defeated or obstructed;</td>
</tr>
<tr>
<td></td>
<td>• making a false statement for the purposes of judicial proceedings;</td>
</tr>
<tr>
<td></td>
<td>• defeating or obstructing police investigation into a crime.</td>
</tr>
<tr>
<td></td>
<td>Level 7 fine or 2 years’ imprisonment or both, where the offence involves—                                                                                                                 • making false statement to police officer that offence has been committed;</td>
</tr>
<tr>
<td></td>
<td>• resisting, hindering or disturbing a police officer executing his or her duty.</td>
</tr>
<tr>
<td></td>
<td>Level 6 fine or 1 year’s imprisonment or both, where the offence involves—                                                                                                                                     • hindering or obstructing an officer of the court in his or her duty;</td>
</tr>
<tr>
<td></td>
<td>• making a statement in connection with pending case, intending to prejudice its trial [s 184]</td>
</tr>
<tr>
<td>Crime</td>
<td>Punishment</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Exposing an infant</td>
<td>Level 10 fine or 5 years’ imprisonment or both [s 108]</td>
</tr>
<tr>
<td>Extortion</td>
<td>Fine of level 13 or twice the value of any property extorted, or 15 years’ imprisonment, or both [s 134]</td>
</tr>
<tr>
<td>Forgery</td>
<td>Level 14 fine or 20 years’ imprisonment or both, in the case of forgery of a public document. Level 13 fine or 15 years’ imprisonment or both, in the case of forgery of anything else [s 137]</td>
</tr>
<tr>
<td>Fraud</td>
<td>Fine of level 14 or twice the value of any property obtained through fraud, or 35 years’ imprisonment, or both [s 136]</td>
</tr>
<tr>
<td>Housebreaking with intent to commit a crime</td>
<td>Fine of level 13 or twice value of any property stolen, destroyed or damaged, or 15 years’ imprisonment, or both, where person– entered dwelling-house; or knew people were present in premises; or carried a weapon; or used violence against a person; or damaged or destroyed property in effecting entry; or committed some other crime. Fine of level 10 or twice value of property destroyed or damaged, or 10 years’ imprisonment, or both, in any other case. [s 131]</td>
</tr>
<tr>
<td>Incest</td>
<td>Level 14 fine or 5 years’ imprisonment or both [s 75]</td>
</tr>
<tr>
<td>Indecent assault</td>
<td>Life imprisonment, where the assault involved penetration of any part of the complainant’s or convicted person’s body [s 66] Level 7 fine or 2 years’ imprisonment or both, in any other case [s 67]</td>
</tr>
<tr>
<td>Kidnapping</td>
<td>Level 7 fine or 2 years’ imprisonment or both, where a child was abducted by a parent or close relative and there was no violence In all other cases, life imprisonment [s 93]</td>
</tr>
<tr>
<td>Malicious injury to property</td>
<td>Fine of level 14 or twice the value of the property damaged, or 25 years’ imprisonment, or both [s 140]</td>
</tr>
<tr>
<td>Offence</td>
<td>Punishment</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| Murder                         | 5 years’ imprisonment, where disturbed mother kills her child within 6 months of giving birth  
                                   | Life imprisonment, where convicted person is under 18                         
                                   | Life imprisonment, where the court finds extenuating circumstances           
                                   | Death in any other case [s 47]                                              |
| Offence against nature         | Unlimited fine or 1 year’s imprisonment or both [s 73]                      |
| (unnatural offence)            |                                                                             |
| Perjury                        | Level 10 fine or 5 years’ imprisonment or both [s 183]                      |
| Public indecency               | Level 9 fine or 6 months’ imprisonment or both [s 77]                       |
| Public violence                | Level 12 fine or 10 years’ imprisonment or both [s 36]                      |
| Rape                           | Life imprisonment [s 65]                                                    |
| Receiving stolen property      | Fine of level 14 or twice value of property received, or 25 years’ imprisonment, or both [s 124] |
| knowing it to be stolen        |                                                                             |
| Robbery                        | Life imprisonment, where the convicted person or an accomplice—              |
|                                | • possessed a firearm or dangerous weapon; or                                |
|                                | • inflicted or threatened serious bodily injury; or                          |
|                                | • killed a person.                                                           |
|                                | Fine of level 14 or twice value of any property taken, or 50 years’ imprisonment, or both, in any other case [s 126] |
| Sedition                       | 20 years’ imprisonment (no fine), where offence involves setting up organisation to overthrow, take over or coerce the government [s 22] |
|                                | Level 12 fine or 10 years’ imprisonment or both, where offence involves disturbing the peace or invading rights of others [s 36] |
| Sodomy                         | Unlimited fine or 1 year’s imprisonment or both [s 73]                      |
| Subornation of perjury         | Level 10 fine or 5 years’ imprisonment or both [s 183 as read with s 202]   |
Theft

Where livestock or its produce is stolen—

- mandatory imprisonment for 9 – 25 years, if bovine or equine animal is stolen and there are no special circumstances;
- fine of level 14 or twice value of stolen livestock or produce, or 25 years’ imprisonment, or both, in any other case [s 114]

Fine of level 14 or twice value of stolen livestock or produce, or 25 years’ imprisonment, or both, in any other case [s 113]

Theft by false pretences

Fine of level 14 or twice value of stolen property, or 25 years’ imprisonment, or both, in any other case [s 113]

Treason

Level 14 fine or 25 years’ imprisonment or both, where offence amounts to concealing treason [s 21]

Death or life imprisonment, in any other case [s 20]

Uttering

Fine of level 14 or twice the value of any property obtained, or 35 years’ imprisonment, or both [s 136]

Violating a dead body

Level 14 fine or 5 years’ imprisonment or both [s 111]

Violating a grave

Level 7 fine or 1 year’s imprisonment or both [s 110]

Sixth Schedule

This provides for the amendment of various enactments affected by the provisions of the Code.

Sixth Schedule

Amending Magistrates Court Act

<table>
<thead>
<tr>
<th>Type of magistrate</th>
<th>Crime</th>
<th>Sentencing jurisdiction</th>
</tr>
</thead>
</table>
| Regional magistrate| Sexual offence (rape, aggravated indecent assault, sexual intercourse or performing indecent act with young person, sodomy, sexual intercourse within prohibited degree of relationship, complicity in sexual crimes) | Up to 20 years in prison  
Fine up to level 14  
Both |
whether or summary trial or remittal of case for trial or sentence by AG

<table>
<thead>
<tr>
<th></th>
<th>Regional magistrate</th>
<th>Magistrate other than regional magistrate</th>
<th>Regional magistrate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deliberate infection of person with STD or HIV</td>
<td>Penalties prescribed by those provisions</td>
<td>Offences relating to dangerous drugs whether on summary trial or remittal of case for trial or sentence by AG</td>
<td>Up to 10 years in prison Fine up to level 12 Both</td>
</tr>
<tr>
<td>Offences relating to dangerous drugs whether on summary trial or remittal of case for trial or sentence by AG</td>
<td>Up to 15 years in prison Fine up to level 13 Both</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

But no magistrate may use these provisions to impose a punishment greater than that prescribed by the Criminal Law Code for such an offence.

**Seventh Schedule**

This specifies the various enactments repealed by s 283.

**Sentencing Jurisdiction of Magistrates**

________

**Ordinary Magistrates**

**Ordinary Jurisdiction (sec 50(1) of the Magistrates Court Act)**

- **Summary jurisdiction**: Fine not exceeding level 7 or imprisonment for a period not exceeding two years, or both.
- **On remittal by the Attorney-General**: Fine not exceeding level 9 or imprisonment for a period not exceeding four years, or both.
- Where the accused is under the age of 18, corporal punishment of up to six cuts.

**Special Jurisdiction (sec 51(1) & (4) of the Magistrates Court Act)**

- For public violence or malicious damage to property (or for an attempt to commit those crimes): fine not exceeding level 11 or imprisonment for a period not exceeding seven years, or both.
For an offence relating to dangerous drugs specified in Chapter VII of the Code: a fine not exceeding level 12 or imprisonment for a period not exceeding 10 years, or both.

**Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)**
- Where the theft involves taking a bovine or equine animal, in the absence of special circumstances in the particular case: imprisonment for a period of between nine and 25 years.
- In other cases of stock theft: a fine not exceeding level 14 or twice the value of the stolen stock, or imprisonment for a period not exceeding 25 years, or both.

**Senior Magistrates**

**Ordinary Jurisdiction (sec 50(2) of the Magistrates Court Act)**
- Fine not exceeding level 9 or imprisonment for a period not exceeding four years, or both.
- Where the accused is under the age of 18, corporal punishment of up to six cuts.

**Special Jurisdiction (sec 51(1) & (4) of the Magistrates Court Act)**
- For public violence or malicious damage to property (or for an attempt to commit those crimes): fine not exceeding level 11 or imprisonment for a period not exceeding seven years, or both.
- For an offence relating to dangerous drugs specified in Chapter VII of the Code: a fine not exceeding level 12 or imprisonment for a period not exceeding 10 years, or both.

**Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)**
- Where the theft involves taking a bovine or equine animal, in the absence of special circumstances in the particular case: imprisonment for a period of between nine and 25 years.
- In other cases of stock theft: a fine not exceeding level 14 or twice the value of the stolen stock, or imprisonment for a period not exceeding 25 years, or both.


**Provincial Magistrates**

**Ordinary Jurisdiction (sec 50(3) of the Magistrates Court Act)**
- Fine not exceeding level 10 or imprisonment for a period not exceeding five years, or both.
- Where the accused is under the age of 18, corporal punishment of up to six cuts.

**Special Jurisdiction (sec 51(1) & (4) of the Magistrates Court Act)**
- For public violence or malicious damage to property (or for an attempt to commit those crimes): fine not exceeding level 11 or imprisonment for a period not exceeding seven years, or both.
- For an offence relating to dangerous drugs specified in Chapter VII of the Code: a fine not exceeding level 12 or imprisonment for a period not exceeding 10 years, or both.

**Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)**
- Where the theft involves taking a bovine or equine animal, in the absence of special circumstances in the particular case: imprisonment for a period of between nine and 25 years.
- In other cases of stock theft: a fine not exceeding level 14 or twice the value of the stolen stock, or imprisonment for a period not exceeding 25 years, or both.

**Regional Magistrates**

**Ordinary Jurisdiction (sec 50(4) & (6) of the Magistrates Court Act)**
- Fine not exceeding level 12 or imprisonment for a period not exceeding 10 years, or both.
- Where the accused is under the age of 18, corporal punishment of up to six cuts.

**Special Jurisdiction (sec 51(2) & (4) of the Magistrates Court Act)**

<table>
<thead>
<tr>
<th>Crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public violence or malicious damage to property, or an attempt to commit these crimes;</td>
</tr>
<tr>
<td>Robbery or attempted robbery committed in circumstances of aggravation.</td>
</tr>
<tr>
<td>Sentence</td>
</tr>
<tr>
<td>Fine not exceeding level 13 or imprisonment for period not exceeding 12 years, or both.</td>
</tr>
<tr>
<td>Crimes</td>
</tr>
<tr>
<td>--------</td>
</tr>
<tr>
<td>Rape (s 65) or attempted rape; Aggravated indecent assault (s 66) or attempted aggravated assault; Indecent assault (s 67) or attempted indecent assault; Sexual intercourse or performing indecent acts with a young person (s 70) or an attempt to commit this offence; Sodomy (s 73) or an attempted sodomy; Bestiality (s 74) or attempted sodomy; sexual intercourse within a prohibited degree of relationship (s 75) or an attempt to commit this offence; Complicity in sexual crimes (s 76) or an attempt to commit this offence.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Crime</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deliberate infection of another with sexually transmitted disease (s 78)</td>
<td>Unlimited fine or imprisonment for period not exceeding five years, or both.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Crime</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deliberate transmission of HIV (s 79)</td>
<td>Imprisonment for period not exceeding 20 years.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Crime</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offence relating to dangerous drugs specified in Chapter VII of the Code</td>
<td>Fine not exceeding level 13 or imprisonment for period not exceeding 15 years, or both.</td>
</tr>
</tbody>
</table>
Special Jurisdiction for Stock Theft (sec 9 of the Stock Theft Prevention Act)

- Where the theft involves taking a bovine or equine animal, in the absence of special circumstances in the particular case: imprisonment for a period of between nine and 25 years.
- In other cases of stock theft: a fine not exceeding level 14 or twice the value of the stolen stock, or imprisonment for a period not exceeding 25 years, or both.

Specimen Indictments

Note the new subsections of s 146 of the Criminal Procedure and Evidence Act:

(4) Where a person is charged with a crime listed in the second column of the Fifth Schedule to the Criminal Law Code, it shall be sufficient to charge him or her with that crime by its name only.

(5) No indictment, summons or charge alleging the commission of a crime mentioned in subsection (4) shall be held to be defective on account of a failure to mention the section of the Criminal Law Code under which the crime is set forth.

Crimes against the State

Treason

Charged with treason as defined in section 20(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, who was a citizen of Zimbabwe or ordinarily resident in Zimbabwe, unlawfully and with the intention of overthrowing the Government of Zimbabwe instigated B, C and D, Ministers in the government of [a named foreign country], to cause the armed forces of that country to invade Zimbabwe.

Charged with treason as defined in section 20(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, who was a citizen of Zimbabwe or ordinarily resident in Zimbabwe, unlawfully and with the intention of overthrowing the Government of Zimbabwe conspired with B and C to instigate the armed forces of [a named foreign country] to invade Zimbabwe.
Concealing treason

Charged with concealing treason as defined in section 21 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A, who was a citizen of Zimbabwe or ordinarily resident in Zimbabwe and who knew that B had conspired with C and D to instigate the armed forces of [a named foreign country] to invade Zimbabwe, unlawfully did not inform an official as soon as was reasonably possible after acquiring that knowledge.

Insurgency, banditry, sabotage or terrorism

Charged with insurgency, banditry, sabotage or terrorism as defined in section 23(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A was a member of a group of bandits who unlawfully and for the purpose of causing forcible resistance to the Defence Forces, fired shots from AK rifles at members of the Zimbabwe National Army with the intention or realising there was a real risk or possibility of killing one of those members of the Zimbabwe National Army. A knowingly associated himself with the other members of the group in firing the shots and was present when the shots were fired.

Publishing or communicating false statement prejudicial to the State

Charged with publishing a false statement prejudicial to the State, as defined in section 31(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A unlawfully published in the XY newspaper the statement set out in the Annexe to this charge. The statement was materially false in the following respects:

(a) …

(b) …

When A published the statement he intended to incite or promote public disorder or public violence or realised that there was a real risk or possibility that publication of the statement would incite or promote such disorder or violence.

Charged with publishing a false statement prejudicial to the State, as defined in section 31(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A unlawfully published in the XY newspaper the statement set out in the Annexe to this charge. The statement was materially false in the respects set out in the Annexe, and A knew it was false or did not have reasonable grounds for believing it to be true. Publication of the statement promoted public disorder, namely riots that occurred on the … in and near the central business district of Harare.
**Crimes against Public Order**

**Public violence**

Charged with public violence as defined in section 36(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, B and C, acting in concert with persons whose names are unknown to the prosecutor, unlawfully and forcibly disturbed the peace, security or order of the public to a serious extent by erecting barricades across a road, namely Samora Machel Avenue, and throwing stones and other missiles at members of the public who were on or near that road and at police officers who attempted to remove the barricades.

**Crimes against the Person**

**Homicide**

**Murder**

Charged with murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully caused the death of a person named B, either intending to kill B or, despite realising that there was a real risk or possibility that his conduct might cause death, continuing to engage in that conduct.

**Culpable homicide**

Charged with culpable homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully caused the death of a person named B, either negligently failing to realise that death might result from his conduct or, despite realising that death might result from his conduct, negligently failing to guard against that possibility.

**Sexual Crimes**

**Rape**

Charged with rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, a male person, unlawfully had anal sexual intercourse with B, a female person, without her consent knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it.
Attempted rape
Charged with attempted rape as defined in section 65 as read with section 189 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the . . . and at . . ., A, a male person unlawfully attempted to have sexual intercourse with B a female person without her consent knowing that she had not consented or realising that there was a real risk or possibility that she may not have consented.

Rape of a mentally incompetent female
Charged with rape as defined in section 65 as read with section 64 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the . . . and at . . ., A, a male person, knowingly and unlawfully had sexual intercourse with a female person who was mentally incompetent and incapable of giving consent or who was capable of giving consent but did not consent to the knowledge of A.

Aggravated indecent assault
Charged with Aggravated Indecent Assault as defined in section 66 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … A, a male person, unlawfully and with indecent intent inserted his penis into the mouth of B, a female person, knowing that B had not consented to this act or realising that there was a real risk or possibility that B might not have consented to it.

In that on the … and at … A, a female person, unlawfully and with indecent intent inserted an object known as a vibrator into the vagina of B, a female person, knowing that B had not consented to this act or realising that there was a real risk or possibility that B might not have consented to it.

Indecent assault
Charged with Indecent Assault as defined in section 67 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … A, a male person, unlawfully and with indecent intent fondled the breasts of B, a female person, knowing that B had not consented to this act or realising that there was a real risk or possibility that B might not have consented to it.

Sexual intercourse with a young person
Charged with sexual intercourse with a young person, as defined in section 70 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … A, a male person, unlawfully had extra-marital sexual intercourse with B, a girl under the age of 16.
In that on the … and at … A, a female person, unlawfully had extra-marital sexual intercourse with B, a boy under the age of 16.

**Commission of sexual crime outside Zimbabwe**

Charged with committing a sexual crime against a young person outside Zimbabwe as defined in section 71 as read with section 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

In that on the . . . in Lusaka, Zambia, A, a citizen or Zimbabwe had sexual intercourse with a 10 year old girl, thereby committing the crime of rape upon her.

**Inciting person to commit sexual crime inside Zimbabwe**

Charged with inciting another to commit a sexual crime against a young person in Zimbabwe as defined in section 72 as read with section 66 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

In that on the . . . in Johannesburg, South Africa, A incited B to proceed to Zimbabwe for the purpose of having anal sexual intercourse with a boy aged 11.

**Sexual intercourse within the prohibited degrees of relationship**

Charged with sexual intercourse within the prohibited degrees of relationship as defined in section 75(2)(c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

In that on the . . . and at . . . A and B being brother and sister respectively unlawfully had sexual intercourse together knowing that they were related within the prohibited degrees of relationship realising that there was a real risk or possibility that they were so related.

Charged with sexual intercourse within the prohibited degrees of relationship as defined in section 75(2)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]

In that on the . . . and at . . . A and B being first cousins unlawfully had sexual intercourse together knowing that they were related within the prohibited degrees of relationship realising that there was a real risk or possibility that they were so related.

**Crimes Involving Bodily Injury**
Assault
Charged with assault as defined in section 89(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully committed an assault upon B with a knife or some other sharp instrument, intending to cause B bodily harm or realising that there was a real risk or possibility that bodily harm might result, and inflicted stab wounds on B’s body.

Charged with assault as defined in section 89(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully committed an assault upon B by threatening to stab him with a knife or other sharp instrument, intending to inspire in B’s mind, or realising that there was a real risk or possibility of inspiring in B’s mind, a reasonable fear or belief that force would immediately be used against him.

Negligently causing serious bodily harm
Charged with negligently causing serious bodily harm as defined in section 90 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully caused serious bodily harm to B, that is to say, caused B to suffer second-degree burns on his chest and arms by pouring boiling water upon him, negligently failing to realise that serious bodily harm might result from his conduct or negligently failing to guard against that possibility.

Crimes Involving Infringement of Liberty, Dignity, Privacy or Reputation

Kidnapping (of an adult)
Charged with kidnapping as defined in section 93(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully deprived B, an adult, of his freedom of bodily movement, that is to say purported to arrest B and detained him, intending to cause such deprivation or realising that there was a real risk or possibility that such deprivation might result.

Kidnapping (of a child)
Charged with kidnapping as defined in section 93(1)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, who was not the lawful custodian of a child named B, unlawfully detained B and deprived B of his freedom of bodily movement, intending to cause such deprivation or realising that there was a real risk or possibility that such deprivation might result.
Kidnapping (of a child by a non-custodian parent)
Charged with kidnapping as defined in section 93(1)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A, who was the father but not the lawful custodian of a child named B, detained or kept B with the intention of depriving C, B’s mother and lawful custodian, of her control over B or realising that there was a real risk or possibility that such deprivation might result.

Pledging a female person (promising a minor in marriage)
Charged with pledging of a female person as defined in section 94(1)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A, being the lawful custodian of B, a 16-year-old girl, unlawfully entered into an arrangement whereby B was promised in marriage to a man named C.

Pledging a female person (promising an adult in marriage)
Charged with pledging of a female person as defined in section 94(1)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A, being the father of B, an adult woman, unlawfully entered into an arrangement without B’s consent whereby B was promised in marriage to a man named C.

Criminal insult
Charged with criminal insult as defined in section 95(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A unlawfully and seriously impaired the dignity of a woman named B by accosting B and saying to her in the Shona language “Ndiri kuzokusvira”, which translated into the English language means “I will have sexual intercourse with you,” intending by his conduct to impair her dignity seriously or realising that there was a real risk or possibility that his conduct might have that effect.

Charged with criminal insult as defined in section 95(1)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A unlawfully and seriously invaded the privacy of a woman named B by observing B while she was taking a bath and in a state of nudity or semi-nudity, intending by his conduct to invade her privacy seriously or realising that there was a real risk or possibility that his conduct might have that effect.

Criminal defamation
Charged with criminal defamation as defined in section 96(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A unlawfully published in X magazine the statement set out in the Annexe to this charge, which statement was false in the material particulars set out in that Annexe. When A published the statement he knew it was false in those particulars or realised
there was a real risk or possibility that it was false, and by publishing the statement he intended to harm the reputation of B. The statement caused serious harm to the reputation of B or created a real risk or possibility of causing such harm.

**Witchcraft, witch-finding, etc.**

**Indicating a witch/wizard**

Charged with indicating a witch [or wizard if the person is a man], as defined in section 99 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … A, by the purported use of non-natural means [or, where the accused merely made the accusation, use the word “groundlessly” instead of “by the purported use of non-natural means”], unlawfully accused B of witchcraft by indicating that B had used non-natural means to cause the death of a child named C.

**Bigamy**

Charged with bigamy as defined in section 104 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, being a party to a monogamous marriage and knowing that this marriage still subsisted unlawfully entered into a second monogamous marriage with B.

In that on the … and at … , A, being a party to a monogamous marriage and knowing that this marriage still subsisted unlawfully entered into a polygamous marriage with B.

**Property Crimes**

**Theft and related crimes**

**Theft**

Charged with theft as defined in section 113 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully took property, namely a bicycle, knowing that B was entitled to own, possess or control the property or realising that there was a real risk or possibility that B might be so entitled, and intending to deprive B permanently of his ownership, possession or control of the property or realising that there was a real risk or possibility that B might be deprived of that ownership, possession or control.

**Theft of trust property**

Charged with theft as defined in section 113(2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, unlawfully and in violation of a trust agreement with Y which required him to hold a certain item belonging to Y and hand back that item to Y on
demand by Y, unlawfully and intentionally converted the item to his own use and failed to hand back the item on demand by Y.

**Unauthorised borrowing or use of property**

Charged with unauthorised borrowing or use of property, as defined in section 116 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A unlawfully took possession or control of a bicycle belonging to B without the consent of B, intending to make temporary use of the bicycle and then return it to B’s possession or control. When A took the bicycle he knew that another person was entitled to own, possess or control it or realised that there was a real risk or possibility that another person might be so entitled.

**Making off without payment**

Charged with making off without payment as defined in section 117 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A had a meal at a restaurant belonging to B and, after the meal, unlawfully made off without paying for the meal, knowing that he was obliged to pay for the meal before leaving the restaurant.

In that on the … and at …, A had some keys cut at a shop belonging to B and, after the cut keys had been handed over to him, made off without paying for them, knowing that he was obliged to pay for the service before he left the shop.

**Robbery**

Charged with Robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A unlawfully and intentionally used violence against B in order to steal B’s bag which contained an amount of one million dollars.

In that on the … and at …, A unlawfully grabbed B’s briefcase which was on the ground alongside B and immediately after the taking of the bag, when B chased A in order to try to recover his briefcase, A used a threat of violence against B to stop him from continuing to try to recover his brief case.

**Unlawful entry onto premises**

Charged with Unlawful Entry into Premises as defined in section 131 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A unlawfully, intentionally and without permission or authority from B, the lawful occupier of the premises concerned, or without other lawful authority, entered B’s premises, by climbing into those premises through an open window.
Note that if A committed a crime inside the premises that he has unlawfully entered, such as robbery, theft or rape, A must be charged additionally with the crime which he committed inside the premises.

**Criminal trespass**

Charged with Criminal Trespass as defined in section 132 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A unlawfully entered B’s land, which land was enclosed by a fence, knowing or realising there is a real risk or possibility that such entry is prohibited.

In that on the … and at …, A having entered B’s land, unlawfully refused to leave the land when called upon to do so by B who was the lawful occupier of that land.

**Fraud**

Charged with Fraud as defined in section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A, sold a painting to B for twenty million dollars by unlawfully and intentionally misrepresenting to B that the painting he was selling to him was an original Monet and was worth a substantial amount of money whereas to the knowledge of A the painting was simply a copy of the original, and by such misrepresentation, A caused B to act to his financial prejudice.

**Forgery**

Charged with Forgery as defined in section 137 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A, forged a blank cheque form belonging to B by filling out false details on the cheque and forging the signature of B, intending to defraud B by presenting the cheque for payment at the bank.

**Fraud**

Charged with Fraud as defined in section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at …, A, knowing that B had forged a cheque presented that cheque for payment at a bank intending to defraud the bank.
Extortion
Charged with Extortion as defined in section 134 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at …, A unlawfully obtained an amount of fifty million dollars from B by threatening to cause harm to A’s son unless the money was paid to him.

In that on the … and at …, A unlawfully obtained an amount of ten million dollars from B, an female, by intentionally threatening to display to others pictures of B in a state of nakedness, which pictures he had obtained illegally, unless the money was paid to A by B.

Causing damage to or destruction of property
Negligently causing serious damage to property
Charged with negligently causing serious damage to property, as defined in section 141 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at …, A unlawfully caused serious damage to a shed belonging to B by his gross negligence in starting a fire close to the shed, which fire spread to the shed and caused serious damage it.

Hijacking and Other Crimes Involving Aircraft
Hijacking
Charged with hijacking as defined in section 147 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at …, A without lawful reason took or exercised control over an aircraft, namely an Air Zimbabwe Boeing 737 aircraft flying between Harare and Johannesburg.

Placing or carrying dangerous goods on an aircraft
Charged with carrying dangerous goods on an aircraft as defined in section 150(1)(d) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at …, A without lawful reason had dangerous goods, namely a Makarov 9-millimetre pistol, in his possession aboard an aircraft, namely an Air Zimbabwe Boeing 737 aircraft flying between Harare and Johannesburg.
Placing or carrying dangerous goods on an aircraft (attempt)
Charged with attempting to place or carry dangerous goods on an aircraft, as defined in section 150(1)(a) as read with section 189 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … A without lawful reason attempted to place or carry dangerous goods, namely a Makarov 9-millimetre pistol, aboard an aircraft, namely an Air Zimbabwe Boeing 737 aircraft flying between Harare and Johannesburg.

Falsely threatening harm in relation to an aircraft
Charged with falsely threatening harm in relation to an aircraft as defined in section 152 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A without lawful reason made a statement knowing it to be false or realising that there was a real risk or possibility that it might be false, from which it could reasonably be inferred that there was a plan, proposal, conspiracy or threat to destroy, damage or prejudice the safe operation of an aircraft; that is to say, A stated to B, an employee of the Civil Aviation Authority at Harare International Airport, that a bomb had been or would be placed aboard Air Zimbabwe flight 237 bound for London.

Crimes Involving Dangerous Drugs

Unlawful dealing in dangerous drugs
Charged with unlawful dealing in dangerous drugs, as defined in section 156(1)(c) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A unlawfully possessed a dangerous drug, namely 50 kilograms of prepared cannabis (mbanje), for the purpose of dealing in such drug.

Unlawful possession of dangerous drugs
Charged with unlawful possession of a dangerous drug, as defined in section 157(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A unlawfully possessed a dangerous drug, namely five grams of prepared cannabis (mbanje).

Computer-Related Crimes

Unauthorised access to or use of computer or computer network
Charged with unauthorised access to a computer network, as defined in section 163(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A, without authority from the owner of the computer network concerned, intentionally gained access to data, programmes and systems held in a computer network owned by Barclays Bank Zimbabwe Limited, a banking institution carrying on business in Zimbabwe.
Unauthorised use or possession of credit or debit cards
Charged with unauthorised use or possession of a credit or debit card, as defined in section 167(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A without reasonable excuse possessed Diners Club credit card number X12345 belonging to a person named B.

Unauthorised use of password or pin-number
Charged with unauthorised use of a password or pin-number, as defined in section 168 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A without authority intentionally used a password or pin-number which belonged to or had been assigned to another person, that is to say inserted Barclays debit card number X1234 into an automatic teller machine and used the pin-number assigned to B, the holder of the card.

Bribery and Corruption

Bribery (accepting bribe)
Charged with bribery as defined in section 170(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A, being an agent, that is to say an employee of the Harare Municipality, unlawfully obtained for himself a gift or consideration as an inducement or reward for doing or for not doing an act in relation to his principal’s affairs or business, that is to say, accepted twenty million dollars from B for approving the plans of a dwelling-house which B proposed to build on Stand 450 Mabelreign Township. When A obtained the gift or consideration he knew or realised that there was a real risk or possibility that it was not due to him in terms of any agreement or arrangement between himself and his principal, the Harare Municipality.

Bribery (offering bribe)
Charged with bribery as defined in section 170(1)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

In that on the … and at … , A unlawfully offered a gift or consideration to an agent named B, who was an employee of the Harare Municipality, as an inducement or reward for doing or for not doing an act in relation to his principal’s affairs or business, that is to say, offered twenty million dollars to B as an inducement or reward for approving the plans of a dwelling-house which A proposed to build on Stand 450 Mabelreign Township. When A offered the gift or consideration he knew or realised that there was a real risk or possibility that it was not due to B in terms of any agreement or arrangement between B and his principal, the Harare Municipality.
Corruptly concealing personal interest in a transaction
Charged with corruptly concealing from a principal a personal interest in a transaction, as defined in section 173(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A, being an agent, that is to say an employee of a company named ABC (Pvt) Ltd, carried out a transaction in connection with his principal’s affairs without disclosing to the principal that he held a personal interest in the subject-matter of the transaction, that is to say he arranged the purchase of machinery and spares worth fifty million dollars on behalf of his principal from a company named DEF (Pvt) Ltd without disclosing to his principal that he was a director of DEF (Pvt) Ltd. When A carried out this transaction he intended to deceive his principal, or realised that there was a real risk or possibility that his principal might be deceived.

Threat
Charged with making a threat, as defined in section 186 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … , A, threatened to murder B and inspired in B a reasonable belief that A would carry out his threat and A, by his threat, intended to inspire in B such a reasonable belief or realised that there was a real risk or possibility of inspiring in B such a belief.

Incitement
Charged with incitement to commit robbery, as defined in section 170 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at A unlawfully incited B to assist A to rob a bank.

Conspiracy
Charged with conspiracy to commit malicious damage to property, as defined in section 188 as read with s 140 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the … and at … A, B and C agreed to set fire to D’s house, intending to carry out the agreement.

Attempt to commit crime contained in Code
Charged with the crime of attempted unlawful entry into premises as defined in section 189 as read with section 131 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
In that on the . . . and at . . . A, unlawfully attempted to enter the premises of B by breaking the burglar bars on a window but was unable to break the bars and was unable to effect entry into the premises.

**Attempt to commit crime in statute other than in Code**

**Charged with the crime of attempting to contravene section 4 of the Official Secrets Act [Chapter 11.09] as read with section 189 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]**

In that on the . . . and at . . ., A, who had in his possession a secret official code relating to a prohibited place attempted to communicates such code to a person, other than a person to whom he was authorized to communicate it.

(See section 4 of the Criminal Law Code.)